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No. ..-....

IN THE

# Supreme Court of the United States

October Term, 1983

UNION OIL COMPANY OF CALIFORNIA,

*Petitioner,*

*vs.*

DILLINGHAM TUG & BARGE CORPORATION, NICKUM & SPAULDING ASSOCIATES, INC.,

and

THE SALVAGE ASSOCIATION,

*Respondents.*

## PETITION FOR CERTIORARI.

HANS E. MENTER,
DENNIS P. CODON.

KEESAL, YOUNG & LOGAN,
SAMUEL A. KEESAL, JR.,
SCOTT T. PRATT,
WILLIAM F. DALY, JR.,
Pier F - Berth 203,
Post Office Box 1730,
Long Beach, Calif. 90801,
(213) 436-9051,
*Attorneys for Union Oil Company of California.*

Parker & Son, Inc., Law Printers, Los Angeles. Phone 724-6622

## Questions Presented.

A. Should a towage company be allowed to use indirect means of contracting away its liability for negligence in contravention of this Court's decisions in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963)?

B. Did the appellate court abuse its discretion in reversing the trial court's finding that the negligence of the naval architect and the surveyor of the barge COLUMBIA proximately caused her sinking?

**The Parties.**

The parties to this action are Union Oil Company of California ("Union"), Petitioner, and Dillingham Tug & Barge Corporation ("Dillingham"), Nickum & Spaulding Associates, Inc. ("N & S"), and The Salvage Association ("Salvage").

For the Court's information, Collier Carbon & Chemical Corporation, the original defendant in this action, has, since the inception of this litigation, become a division of Union. In addition, Todd Shipyards Corporation was at one time a third-party defendant in this action, but that claim was resolved by settlement.

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THE SALVAGE ASSOCIATION,

*Respondents.*

## PETITION FOR CERTIORARI.

### I.
### OFFICIAL AND UNOFFICIAL REPORTS.

The only opinion in this litigation which has been reported is the opinion of the United States Court of Appeals for the Ninth Circuit.[1] The official citation to that opinion is *Dillingham Tug & Barge Corporation v. Collier Carbon & Chemical Corporation*, 707 F.2d 1086 (9th Cir. 1983).

### II.
### BASIS FOR SUPREME COURT JURISDICTION.

This Petition arises from a decision of the United States Court of Appeals for the Ninth Circuit.[2] That decision was filed and entered on June 10, 1983.

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[1]A copy of the opinion of the Court of Appeals is attached to the Appendix, labeled Exhibit "1," and incorporated herein by this reference.

[2]See Exhibit "1."

On June 29, 1983, Union filed its Petition for Rehearing. On September 6, 1983, the order denying the Petition for Rehearing of Union was filed in the United States Court of Appeals for the Ninth Circuit.[3]

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §2101(c), and Rules 20.2 and 20.4 of the Supreme Court of the United States.

## III.
## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES.

This case does not involve any constitutional provisions, treaties, statutes, ordinances or regulations.

## IV.
## STATEMENT OF THE CASE.

### A. Statement of Facts.

Union purchased the ammonia barge COLUMBIA in the spring of 1976. Union wished to have the COLUMBIA ocean towed from Galveston, Texas to Portland, Oregon. The COLUMBIA had been built as an inland barge, and Union intended to use it on the Columbia River as an inland barge, but it was necessary to modify the COLUMBIA somewhat to survive the rigors of the one-time ocean tow.

Union retained N & S to perform the naval architectural and marine engineering services that would enable the COLUMBIA to safely complete the ocean tow. N & S originally proposed that a hopper cover be built for the barge to prevent it from filling with water. However, because of the expense of this alternative, Union asked N & S if the barge could survive the ocean voyage without the hopper cover. N & S concluded the hopper cover could be elimi-

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[3]A copy of the order of the Court of Appeals denying the Petition for Rehearing is attached to the Appendix, labeled Exhibit "2," and incorporated herein by reference.

nated without increasing the risk of the tow so long as there were additional tie-down devices to secure the pair of ammonia cargo tanks that ran the length of the barge.

Union's underwriters required the barge to be surveyed by a designated surveyor or salvage association. Union hired Salvage to perform the necessary survey. Salvage determined the barge was seaworthy for the proposed tow, and issued the survey certificate required by Union's underwriters. As part of their survey, Salvage reviewed the design calculations performed by N & S. Salvage also made recommendations for the tow, *inter alia*, the maximum speed should be restricted to eight knots through the water, the crew of the tug should check the barge periodically to insure that it was not taking on water, and if the barge was filling with water, the water should be pumped out as soon as possible.

Union hired Dillingham to perform the tow. The towage contract required Dillingham to give "due regard" to Salvage's recommendations. The towage contract also provided that Union would look only to its insurance for recovery of any loss or damage to the COLUMBIA. In addition, Union's underwriters were required to waive subrogation against Dillingham. Furthermore, the towage contract required Union to maintain Hull and Machinery insurance on the COLUMBIA to its full value naming Dillingham as an additional assured. The provisions of the towage agreement completely insulated Dillingham from any liability for loss of the COLUMBIA.

The COLUMBIA was insured on Union's fleet Hull and Machinery policy with the required waiver of subrogation against Dillingham, but also with a $1,000,000 deductible. Dillingham was informed of this deductible prior to the departure of the tow from Galveston, Texas.

The tow commenced on January 29, 1977. By the time the barge had reached the Panama Canal, over one foot of water had accumulated in the barge's hopper, but the crew of the Dillingham tug neglected to pump the water out. After leaving the Panama Canal, the tow consistently exceeded the recommended speed of eight knots. On February 25, the tow encountered heavy seas and speed was reduced, but the COLUMBIA continued to take on water. After some hours passed, and several speed reductions, the captain of the Dillingham tug decided to head for Bahia Ballenas to pump out the barge.

Bahia Ballenas was over one hundred miles away at this point, and the tow had to head into the northwesterly seas to reach this port of refuge. Meanwhile, the port of Bahia Santa Maria was only twenty miles away, due east of the tug and tow. Hours later, the captain of the Dillingham changed course for Bahia Santa Maria, but it was much too late. The straps securing the ammonia cargo tanks to the barge broke loose, floated free and the COLUMBIA sank.

**B. Procedural History.**

The complaint in this action was filed by Dillingham, who sued Union for unpaid towage fees, equipment costs and Panama Canal fees amounting to $147,893.20. The basis for subject matter jurisdiction in the District Court was the admiralty and maritime jurisdiction of Rule 9(h) of the *Federal Rules of Civil Procedure*.

With its answer, Union filed a counterclaim for (1) breach of contract, (2) negligence, and (3) gross negligence and willful misconduct arising out of Dillingham's towage and sinking of the COLUMBIA. Union's counterclaim sought damages of $2,500,000.

When Union became apprised of additional facts revealing defects in the design, construction and survey of the

COLUMBIA, Union filed a third-party complaint against N & S, Todd Shipyards Corporation and Salvage for breach of contract, breach of warranty and negligence. The third-party complaint sought damages of $2,500,000 on each cause of action. In response to Union's claim, Dillingham and the third-party defendants filed actions against each other seeking contribution and equitable indemnification. Prior to trial, Union settled its claim against Todd Shipyards Corporation.

On September 16, 1980 through October 16, 1980, a bench trial was conducted by the Honorable Daniel Thomas sitting by designation in the United States District Court for the Northern District of California. On March 2, 1981, judgment for $816,245.28 was entered in favor of Union.[4] In support of that judgment, the trial court found:

(1) Dillingham had negligently and improperly performed the tow of the COLUMBIA and was 60% at fault for the sinking;[5]

(2) N & S had negligently and incorrectly performed calculations regarding the COLUMBIA's seakeeping performance and was 20% at fault for the sinking of the COLUMBIA;[6] and

(3) Salvage had negligently performed the survey of the COLUMBIA and the review of engineering calculations, and was 20% at fault for the sinking of the COLUMBIA.[7]

In addition, the trial court entered judgment for $9,737.40 in favor of Dillingham for port charges, canal fees and other

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[4]A copy of the judgment entered by the trial court is attached to the Appendix, labeled Exhibit "3," and incorporated herein by this reference.

[5]A copy of the Findings of Fact and Conclusions of Law entered by the trial court is attached to the Appendix, labeled Exhibit "4," and incorporated herein by this reference. See Exhibit 4, ¶¶2, 3 and 12.

[6]See Exhibit "4," ¶5.

[7]See Exhibit "4," ¶6.

miscellaneous expenses incurred in the tow.[8]

On March 11, 1981, Dillingham filed a Motion to Alter or Amend Judgment. The parties to this appeal both supported and opposed that motion. On September 17, 1981, the trial court issued Supplemental Findings of Fact and Conclusions of Law that amended the effective date of the March 2, 1981 judgment.[9] Pursuant to Rule 4(a)(1), (4) of the *Federal Rules of Appellate Procedure*, Union filed its notice of appeal on October 2, 1981.

On appeal from the trial court, the United States Court of Appeals for the Ninth Circuit:

(1) reversed the judgment against Dillingham on the ground the towage contract insulated Dillingham from liability for the loss of the COLUMBIA;[10]

(2) reversed the judgments against N & S and Salvage on the ground their negligence was not a proximate cause of the sinking of the COLUMBIA;

(3) affirmed that Dillingham could not collect the towage fee because of its breach of the implied warranty of workmanlike service; and

(4) reversed the judgment against Union for $9,737.40 on the ground Dillingham could not collect its port charges, Panama Canal fees and other miscellaneous expenses because it had breached the implied warranty of workmanlike service in the course of the tow of the COLUMBIA.

As set forth in section II, *supra*, Union filed a Petition for Rehearing with the Court of Appeal which was denied on September 6, 1983.[11]

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[8]See Exhibit "3" and Exhibit "4," ¶9.

[9]A copy of the Supplemental Findings of Fact and Conclusions of Law entered by the trial court is attached to the Appendix, labeled Exhibit "5," and incorporated herein by this reference.

[10]See Exhibit "1." *See also Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp.*, 707 F.2d 1086 (9th Cir. 1983).

[11]See Exhibit "2."

## V.
## ARGUMENT.

### A. The Federal Appellate Court Ruling Upholding the Validity of the Dillingham Towage Contract Is in Conflict With This Court's Decisions in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963).

Pursuant to Rule 17(c) of the Rules of the Supreme Court of the United States, Union submits the federal court of appeals has decided a question of federal law in conflict with two applicable decisions of this Court.

The towage agreement between Dillingham and Union[12] contained numerous provisions designed to insulate Dillingham from liability for loss of the COLUMBIA and to insure payment of towage fees, regardless of the conduct of the tow. For example, Clause Four of the towage agreement[13] purported to exculpate Dillingham for any loss or damage to the resulting from the acts or negligence of Dillingham. Similarly, Clause Two of the contract[14] provided that Dillingham's $125,000 towage fee be deemed earned upon commencement of the tow.

The insurance provision contained in Clause Seven is a more subtle attempt at exoneration from liability by Dillingham, but the ultimate effect is identical. Clause Seven of the towage agreement (hereinafter the "insurance provision") provides, in relevant part:

> [UNION] shall maintain Hull and Machinery . . . insurance on the Barge to its full value in form and

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[12]Trial Exhibit 1-M; a copy of the towage agreement is attached to the Appendix, labeled Exhibit "6," and incorporated herein by this reference.

[13]Exhibit "6," ¶4.

[14]Exhibit "6," ¶2.

> amount satisfactory to [DILLINGHAM] and such policies shall be endorsed with a waiver of subrogation against [DILLINGHAM] as an additional assured with loss payable to [UNION]. [UNION] shall look solely to its Hull and Machinery insurance for the recovery of any loss or damage to the barge . . .[15]

Union notes that the first sentence of Clause Seven contains a waiver of subrogation preventing Union's underwriters from proceeding against Dillingham for loss of the barge. Likewise, the second sentence of Clause Seven, requiring Union to look solely to its insurance, attempts to prevent a direct action against Dillingham by Union. Union submits that this insurance provision effectively precludes any liability of Dillingham for loss of the COLUMBIA and is therefore just as void and enforceable as a direct attempt at exculpation. For example, the insurance provision apparently forecloses any claim by Union or its underwriters if the barge is lost or damaged by the wanton and intentional conduct of Dillingham.

The appellate court failed to conclude that the insurance provision was a direct attempt at exculpation prohibited by the Supreme Court in *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and its progeny. In addition, the appellate court failed to find clearly erroneous the trial court's conclusion that there were no monopolistic tendencies in the tow boat industry.

The appellate court's decision conflicts with the decisions of this Court in two ways. First, *Bisso, supra*, and its progeny prohibit indirect as well as direct attempts to limit liability through exculpatory clauses. Second, *Bisso, supra*, and its progeny do not require a finding of unfair competitive practices, such as overreaching, before a towage agreement can be ruled void and unenforceable.

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[15]Exhibit "6," ¶7.

**1. *Bisso, Supra*, and *Dixilyn, Supra*, Prohibit a Tower From Contracting Away Liability for Negligence and Do Not Require a Finding of Overreaching Before a Contract Can Be Declared Void and Unenforceable.**

In *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955), this Court determined that attempts by towers to contract away liability for their negligence would not be permitted because of "the existence of a judicial rule, based on public policy, invalidating contracts releasing towers from all liability for their negligence." *Id.* at 90. By adopting this rule, this Court attempted:

(a) To discourage negligence by making wrongdoers pay damages; and

(b) To protect those in need of goods or services from being overreached by others who have power to drive hard bargains.

*Id.* at 91. The *Bisso* court concluded that a towage provision calling for the tow to be at the "sole risk" of the barge was invalid.

The Dillingham-Union towage agreement contains similar direct and indirect attempts by the tower to accomplish the exculpatory purpose outlawed by *Bisso*. Clause Four[16] is an explicit "sole-risk" provision — specifically stating that Dillingham will not be responsible for any damage to or loss of the COLUMBIA. In denying a pretrial motion to dismiss brought by Dillingham, Magistrate Rothwell found that Clause Four ran squarely afoul of *Bisso* and was void and unenforceable.[17]

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[16]Exhibit "6," ¶4.

[17]A copy of the Memorandum Report and Order of Magistrate Rothwell, dated November 22, 1977, is attached to the Appendix, labeled Exhibit "7," and incorporated herein by reference.

Union submits that the effect of the insurance provision of the towage agreement is identical to that of a "sole-risk" provision. Forcing Union to look solely to its insurance and requiring Union's underwriters to waive subrogation would completely absolve Dillingham from any liability for negligent, reckless or even intentional acts. In light of *Bisso*, the insurance provision of the towage agreement, like the "sole-risk" provision, should be declared void and unenforceable.

In adopting the *Bisso* rule precluding a tower from contracting out of his own negligence, this Court stated:

> [t]his rule is merely a particular application to the towage business of a general rule long used by courts and legislatures to prevent enforcement of release-from-negligence contracts in many relationships such as bailors and bailees, employers and employees, public service companies and their customers.

*Bisso, supra*, 349 U.S. at 90-91 (footnote omitted).

Nowhere in the *Bisso* opinion does this Court impose a requirement that such contractual provisions can be voided only when accompanied by a trial court finding of monopolistic business practices. In fact, absent from the *Bisso* opinion is any discussion of whether the *Bisso* contract was the product of armslength bargaining or overreaching by the tower. The public policy to discourage negligence by making wrongdoers pay damages is sufficiently strong that no additional findings of fact are required once the exculpatory nature of the contract is demonstrated. Accordingly, the *Bisso* court did *not* remand the case for findings on the question of monopolistic business practices, but voided the contractual provision based on the four corners of the instrument.

Similarly, in *Dixilyn Drilling Corp. v. Crescent Towing & Salvage Co.*, 372 U.S. 697 (1963), the Supreme Court

was concerned with the potential liability of a tow to a third party. As part of the towage agreement, a provision was included whereby the barge and its underwriters would indemnify the tow for any damage claims, regardless of the cause of the damages. The Fifth Circuit Court of Appeals expressly determined that the tower "was in no position to overreach [the barge owner] or to drive a hard bargain," and upheld the towage agreement. *Crescent Towing & Salvage Co. v. Dixilyn Drilling Corp.*, 303 F.2d 237, 246 (5th Cir. 1962).

After finding the Fifth Circuit's decision to be "squarely in conflict with our holding in *Bisso*," a unanimous Supreme Court reversed. *Dixilyn*, *supra*, 372 U.S. at 698. As in *Bisso*, there was no discussion of the presence or absence of monopolistic forces in the tugboat industry — the court looked only to the language of the contract. *See also Boston Metals Co. v. S/S Winding Gulf*, 349 U.S. 122 (1955) (Supreme Court strikes down a towage contract provision shifting responsibility for the acts of the tugboat's crew to the tow — no discussion of monopolistic industry forces).

Accordingly, Union submits that there is no requirement under any Supreme Court precedent that overreaching by the tugboat company is a prerequisite to voiding an exculpatory contractual provision. Once the provision is found to allow a tower to contract out of his own negligence, the provision is void and unenforceable. Furthermore, Union submits that the insurance provision (Clause Seven) of the Dillingham-Union contract was just such an indirect attempt at exculpation.

Because the instant federal court of appeals decision is in conflict with *Bisso* and *Dixilyn* decisions of this Court, Union respectfully requests that this Court grant Union's petition for certiorari.

**B. There Is a Conflict Among the Federal Courts of Appeals Regarding the Enforceability of Exculpatory Insurance Provisions in Towage Contracts.**

Pursuant to rule 17(a) of the Rules of the Supreme Court of the United States, Union submits there is a conflict among the federal courts of appeal regarding the enforceability of insurance provisions in maritime contracts.

In determining the issue of whether the insurance provisions of the Dillingham towage contract were void as against public policy, the United States Court of Appeals for the Ninth Circuit could have adopted the view of either the Fifth Circuit Court of Appeals or the Third Circuit Court of Appeals. The Fifth Circuit has taken the approach that such insurance provisions merely allocate the cost of obtaining coverage. In contrast, the Third Circuit has held that where such insurance provisions insulate a party from liability regardless of culpability, the provisions run afoul of *Bisso, supra,* and *Dixilyn, supra.*

For example, in *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir.), *cert. den.*, 419 U.S. 836, 95 S.Ct. 63, 42 L.Ed.2d 63 (1974), the court concluded that a provision in the towage agreement requiring *each* party to fully insure its vessel, to effect a waiver of subrogation, and to name the other party as an additional assured was not an exculpatory clause of the type provided by *Bisso, supra.*

Contrasted with the result in *Twenty Grand* is the view expressed by the Third Circuit Court of Appeals in *P.P.G. Industries v. Ashland Oil Co.*, 592 F.2d 138 (3d Cir. 1978), *cert. den.*, 444 U.S. 830, 100 S.Ct. 58, 62 L.Ed.2d 38 (1979). In *P.P.G. Industries,* an action was brought by a cargo owner against a barge owner for recovery of damages resulting from the contamination of a load of antifreeze.

The barge owner attempted to prevent recovery by the cargo owner on the ground that the cargo owner had failed to obtain hull and protection and indemnity insurance required by the parties' contract. The district court ruled that even assuming *arguendo* that the cargo owner was contractually bound to maintain coverage, the contractual provision was unenforceable as a matter of public policy, citing *Bisso, supra,* and *Dixilyn Drilling, supra.*

On appeal, the trial court's ruling was affirmed by the Third Circuit Court of Appeals, which stated:

> Requiring the cargo owner to insure the goods and providing there shall be no subrogation is an effective way of insulating the carrier from liability regardless of culpability. The cargo owner can be expected to make a claim against his insurance company in anticipation of reasonably prompt payment rather than proceeding to contest the matter with the carrier. If the insurance company pays the claim, it cannot sue the carrier and, thus, the matter is at an end. As the district court acknowledged, however, such an arrangement runs afoul of *Bisso* and *Dixilyn Drilling* which bar contract provisions that shift responsibility for tower's negligence. *See also Boston Metals Co. v. The Winding Gulf,* 349 U.S. 122, 75 S.Ct. 649, 99 L.Ed. 933 (1955).
>
> We are unpersuaded by cases tending to place a different focus on this issue although the Court of Appeals for the Fifth Circuit has treated the problem as essentially one of bargaining over which party shall pay the insurance premium, we are inclined to view *Dixilyn Drilling, supra,* as proscribing indirect as well as direct exculpation of negligence by carriers. *See Dow Chemical Co. v. M/V Charles F. Detmar, Jr.,* 545 F.2d 1091 (7th Cir. 1976). Moreover, even if the Fifth Circuit approach were used here, it would not help Canal because it never bargained with PPG about

> cargo insurance, and therefore, cannot show reduction of its charges on that basis. Compare *Twenty Grand Offshore Inc. v. West India Carriers, Inc., supra* at 681-83.

*Id.* at 145 (citations omitted).

In the instant case, the Court of Appeals for the Ninth Circuit adopted the reasoning of the Fifth Circuit in finding the insurance provisions of the towage agreement to be enforceable.[18]

Union submits that the decision of the Courts of Appeals for the Fifth and Ninth Circuits are in conflict with the decision of Court of Appeals for the Third Circuit on the issue of whether compulsory insurance provisions in towage contracts are enforceable. This conflict among the federal courts of appeal provides an additional ground for granting the instant petition for certiorari.

**C. In Overturning the Trial Court's Finding That the Negligence of N & S and Salvage Was a Proximate Cause of the Sinking of the COLUMBIA, the Court of Appeals Departed From the Accepted and Usual Course of Judicial Proceedings.**

The trial court found that the negligence of N & S and Salvage was a proximate cause of the sinking of the barge COLUMBIA.[19]

On review, the court of appeal held that the trial court's factual finding of proximate cause was "clearly erroneous" and reversed.[20] Union submits the court of appeal departed from the accepted and usual course of judicial proceedings

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[18]See Exhibit "1." *See also Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp.*, 707 F.2d 1086, 1090 (9th Cir. 1983).

[19]See Exhibit "4," ¶¶5, 6.

[20]See Exhibit "1." *See also Dillingham, supra*, 707 F.2d at 1092-93.

in reversing the trial court's finding. Pursuant to Rule 17(a) of the Rules of the Supreme Court, Union requests that its Petition for Certiorari be granted on this ground.

Union notes that the appellate court affirmed that N & S and Salvage were negligent in the performance of their duties.[21] However, the appellate court goes on to conclude that this negligence was not a proximate cause of the loss of the COLUMBIA. The appellate court concludes the single proximate cause of the loss of the COLUMBIA was the conduct of Dillingham. In reaching this conclusion, the appellate court states:

> [H]ad Dillingham conducted the tow as they were advised to, the barge would have survived the voyage, and therefore the barge was properly designed for the voyage contemplated by the parties. . . . [T]he barge was lost due to Dillingham's failure to conduct the tow properly.

*Dillingham Tug & Barge Corp. v. Collier Carbon & Chemical Corp.*, 707 F.2d 1086, 1091 (9th Cir. 1981).

The appellate court's conclusion is incorrect. The "voyage contemplated by the parties" anticipated that the negligence of Dillingham could cause the open hopper of the barge to fill with water. N & S was supposed to design a barge that could stay afloat under those circumstances.

Gordon Snyder was N & S' principal naval architect in charge of the design modifications for the COLUMBIA. At trial, Mr. Snyder testified that he was fully aware of the possibility that the hopper of the COLUMBIA could flood:

> Q. Now, you were fully aware of the possibility of flooding and that the hopper would become completely full after the decision to remove the cover; is that right?

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[21]See Exhibit "1." *See also Dillingham, supra*, 707 F.2d at 1092.

A. We were required by the Coast Guard to supply straps in the event that the hopper became flooded. . . .

Q. You were aware of the real possibility that the hopper would become completely full; is that correct, Mr. Snyder?

A. It is a possibility.

Q. And you were aware of that possibility prior to the barge HEDGES — the barge COLUMBIA sailing; is that correct?

A. Yes.[22]

Mr. Snyder further testified that he was aware that flooding could occur for any number of reasons, including Dillingham's negligent conduct of the tow:

Q. You anticipated with an open hopper, the vessel might take water, is that correct?

A. That's obvious.

Q. That could happen from an act of God, is that right, rain storm, heavy seas, things of that nature?

A. Well, an act of God encompasses enough things that I would say it could happen from that. . . . Heavy seas, yes.

Q. And if a crew of the tugboat handled the barge inappropriately in heavy seas, there could be water taken on the barge, is that right?

A. Yes.

Q. And you anticipated water in the hopper was a possibility?

A. That's right.[23]

Mr. Snyder's testimony establishes that the ocean voyage contemplated by the parties clearly contemplated that the COLUMBIA could take on water due to the negligent conduct of the tow by Dillingham. When presented with this

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[22]Testimony of Gordon Snyder, principal naval architect for N & S, Record at 851.

[23]*Id.* at 845.

possibility, N & S proposed a cover for the open hopper of the COLUMBIA. Union complained about the high cost of such a cover, and N & S recommended instead the use of additional straps and hold down devices to secure the cargo tanks to the barge. The idea was to use the buoyant force of the empty cargo tanks to keep the COLUMBIA afloat if the hopper of the barge filled with water. In other words, so long as the straps were strong enough to keep the cargo tanks attached to the barge, the empty cargo tanks had enough positive buoyancy to keep the barge afloat even with its hopper flooded.

The additional straps could not eliminate the possibility of flooding, but should have prevented the cargo tanks from breaking loose when the hopper flooded. Mr. Snyder, the principal naval architect for N & S, explains:

> MR. KEESAL: Q. Did you have occasion then to prepare calculations with regard to whether or not you thought it was safe for the barge to proceed without a hopper cover?
>
> A. Yes. . . .
>
> Q. And in order to make the barge safe, you felt that certain straps had to be installed, is that right?
>
> A. That's correct.
>
> Q. And in addition, they [the straps] were to be used to hold the tanks on the barge in the event the hopper became flooded?
>
> A. That's correct.
>
> Q. And you made calculations with regard to the stresses on the straps that hold the tanks onto the barge so that if the hopper did become flooded, the buoyancy of the tanks could keep the hopper and the tanks afloat, is that right?
>
> A. That's correct.[24]

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[24] *Id.* at 844-45.

MR. KEESAL: Q. One of the purposes of those straps was to keep the tanks on the barge if the hopper became flooded, is that right?

A. That was one of the purposes, yes.[25]

Q. And in making the evaluation, you determined that if the hopper did become flooded through an act of God or negligence or otherwise, that the tanks would hold it up; is that right?

A. That is correct.[26]

David Stearn, the expert naval architect who testified on behalf of N & S, also testified at trial that the straps should have been strong enough to hold the cargo tanks to the barge with the hopper flooded:

Q. . . . [i]t was contemplated, then, that there might be a flooding condition in the hopper; is that correct?

A. That's correct.

. . .

Q. And if the hopper flooded, the straps were to hold the tanks onto the barge hopper so that the tanks and the hopper would not sink; is that right?

A. Well, so the tanks wouldn't float away until the hopper could be pumped out.

Q. It would have the effect of keeping the hopper afloat also?

A. It would keep the barge afloat. I believe there is nearly neutral buoyancy in the barge without the tanks. Yes.[27]

Charles Dow, the director of project engineering for Union, recalls his conversations with Mr. Snyder concerning the design of the straps:

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[25] *Id* at 866.

[26] *Id*. at 897.

[27] Testimony of David Stearn, naval architect and expert witness for N & S, Record at 1744-45.

Q. With regard to the hopper cover, what did you ask Mr. Snyder with regard to the hopper cover?

A. If we could remove the hopper cover and still have a seaworthy barge.

. . .

Q. What did he say to you, and what did you say to him during that telephone discussion [about removal of the hopper cover]?

A. I don't remember which or how long it was from the first request to take the cover off. Essentially, it was we could remove the cover and design the thing so it would be seaworthy.

. . .

Q. How did he tell you he was going to do that?

A. Put straps on to hold the tanks down, and as I understand the tanks then with their buoyancy would be — in order words, it would be designed strong enough so that tanks actually could support the barge if it flooded.

. . .

Q. Did Mr. Snyder tell you that the barge, as he designed it with the additional straps, would float even if in a fully flooded condition?

A. That's my understanding, yes.

Q. Did he tell you that?

A. That's what I remember.[28]

Thus, it is clear from the testimony of the naval architect who designed the modifications and from N & S' expert naval architect that N & S not only anticipated that the open hopper of the COLUMBIA could fill with water, but attempted to design a barge which could remain afloat even with the hopper flooded. Contrary to the predictions of N & S, on the first occasion the COLUMBIA flooded, the

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[28]Testimony of Charles Dow, Director of Project Engineering for Union, Record at 1414-15.

straps broke, the cargo tanks floated free and the barge sank.

Admittedly, the cause for water entering the hopper was Dillingham's negligence. However, N & S had supposedly anticipated this contingency by designing a barge that would stay afloat with its hopper flooded.

N & S was not asked to perform an impossible task. N & S contracted to design modifications to a river barge that would enable it to complete a one-time ocean tow from Galveston to Portland. N & S could have informed Union that elimination of the hopper cover was imprudent or that the devices securing the cargo tanks to the barge needed further strengthening. Either of these alternatives would have made it possible for the COLUMBIA to reach Portland safely despite Dillingham's negligence.[29] Neither was recommended.

The appellate court has affirmed the trial court's finding of negligence. Union submits that the trial court's finding of causation is also correct and not clearly erroneous. But for N & S' negligent underestimation of the stresses on the straps with the hopper flooded, the COLUMBIA could have safely reached Portland despite the negligence of Dillingham in allowing the hopper to fill with water. Likewise, if Salvage had properly performed its review of N & S' design calculations, the weakness of the straps would have been discovered and the loss of the COLUMBIA averted.

Union realizes that this Court is normally reluctant to substitute its views for those of the Court of Appeals on purely factual issues. However, in admiralty cases where this court has disagreed with the Court of Appeals' reversal of a trial court's factual findings, this Court has granted certiorari.

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[29]Testimony of Alan Maris, expert naval architect for Union, Record at 1332, 1338-40.

For example, in *Guzman v. Pichirilo*, 369 U.S. 698, 8 L.Ed.2d 205, 88 S.Ct. 1095 (1962), a seaman brought an action in admiralty to recover for injuries resulting from an alleged unseaworthy condition. The owner of the ship sought to be relieved from liability on the theory the vessel was under a demise charter to the plaintiff's employer. The trial court found there was no demise charter and rendered judgment for the plaintiff against the owner. On appeal, the First Circuit Court of Appeal reversed, holding that the ship was under a demise charter to plaintiff's employer.

This Court granted certiorari, reversed the judgment of the Court of Appeals, and reinstated the judgment of the trial court. In so doing, this Court reaffirmed the rule that "an appellate court cannot upset a trial court's factual findings unless it 'is left with the definite and firm conviction that a mistake has been committed.' " *Guzman, supra*, 369 U.S. at 702, 8 L.Ed.2d at 209, *quoting United States v. United States Gypsum Co.*, 333 U.S. 364, 395, 92 L.Ed. 746, 765, 69 S.Ct. 525 (1948).

Union submits that the trial court's finding that the negligence of N & S and Salvage proximately caused the loss of the COLUMBIA is not "clearly erroneous." Given the testimony of N & S' own witness establishing that flooding of the COLUMBIA was anticipated and that the straps were to be strong enough to keep the barge afloat with the hopper flooded, there is no justification for the Court of Appeals' conclusion that the trial court's findings on proximate cause were clearly erroneous.

Accordingly, Union requests its petition be granted to correct this departure from the accepted and usual course of judicial proceedings.

## VI.
## CONCLUSION.

For the reasons set forth above, Union respectfully requests that this Petition for Certiorari be granted, and that Union be allowed to present further legal argument to this Court in support of its contentions that the insurance provisions of the towage agreement are void and unenforceable, and that the negligence of N & S and Salvage proximately caused the loss of the COLUMBIA.

Respectfully submitted,

KEESAL, YOUNG & LOGAN,
SAMUEL A. KEESAL, JR.,
SCOTT T. PRATT,
WILLIAM F. DALY, JR.,
*Attorneys for Union Oil Company of California.*

## EXHIBIT 1.

### Opinion.

United States Court of Appeals for the Ninth Circuit.

Dillingham Tug & Barge Corporation, a corporation, Plaintiff-Appellant and Cross-Appellees, v. Collier Carbon & Chemical Corporation, a corporation, Defendant-Appellee and Cross-Appellant.

Union Oil Company of California, Third Party Plaintiff-Appellant and Cross-Appellee, v. Nickum & Spaulding Associates, Inc.; The Salvage Association, Third Party Defendants-Appellees and Cross-Appellants.

Nos. 81-4494, 81-4538, 81-4540, 81-4547. DC No. 77-1654 WAI.

Filed: June 10, 1983.

Appeal from the United States District Court for the Northern District of California.

Daniel H. Thomas, District Judge, Presiding.

Argued and Submitted January 12, 1983.

Before: TANG and ALARCON, Circuit Judges, and KENYON* District Judge.

KENYON: District Judge:

All four parties to this action appeal from the district court's decision in this case. We affirm in part and reverse in part.

FACTUAL AND PROCEDURAL BACKGROUND

This case arises out of the sinking of the barge *Columbia*, which was owned by the Collier Carbon & Chemical Corporation, a division of the Union Oil Company (Union). The tower of the barge, the Dillingham Tug & Barge Cor-

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*The Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

poration (Dillingham), initiated this action by suing Union for its towing fees. Union counterclaimed against Dillingham, alleging that its negligence caused the loss of the *Columbia*, and also filed a third party complaint against The Salvage Association (Salvage), Nickum & Spaulding (N & S), and Todd Shipyards alleging that their negligence contributed to the loss of the barge. Todd Shipyards settled before trial and is no longer a party to this action.

Union purchased the barge *Columbia* in the spring of 1976. Union wished to have the *Columbia* ocean towed from Galveston, Texas, to Portland, Oregon. The *Columbia* had been built as an inland barge, and Union intended to use it as an inland barge, but it was necessary to modify it somewhat so that it could survive the ocean tow. Union retained N & S to perform the naval architectural and marine engineering services necessary to allow the barge to make the ocean tow. N & S originally proposed that a hopper cover be built for the barge, to prevent it filling with water. However, this would have been very expensive, and so Union asked N & S if the barge could survive an ocean voyage without the hopper cover. N & S advised Union that it could, if the tie-down devices on the barge were strengthened.

Union's underwriters required the barge to be surveyed by a designated surveyor or salvage association. Union hired Salvage to perform the necessary survey. Salvage determined that the barge was seaworthy for the proposed tow, and issued the survey certificate required by Union's underwriters. As part of their survey, Salvage reviewed the calculations performed by N & S. Salvage also made recommendations for the tow, *inter alia* that the maximum speed should be restricted to eight knots through the water, that the crew should check the barge periodically to insure

that it was not taking on water, and that if it was, the water should be pumped out.

Union hired Dillingham to perform the tow. The towing contract required Dillingham to give "due regard" to Salvage's recommendations. The towing contract also required Union to maintain Hull and Machinery insurance on the barge to its full value naming Dillingham as an additional assured with loss payable to Union. The contract further required a waiver of subrogation against Dillingham, and stated that Union would look only to the insurance for recovery for any loss or damage to the barge. The *Columbia* was placed on Union's fleet Hull and Machinery policy, with the required waiver of subrogation against Dillingham, but also with a $1,000,000 deductible. The parties dispute whether Dillingham was informed of this deductible before or after the commencement of the tow, and the trial judge made no finding of fact on this issue.

The tow commenced on January 29, 1977. By the time the barge reached the Panama Canal, several feet of water had accumulated in the barge's hopper, but the towing crew did not pump it out. After leaving the Canal, the tow consistently exceeded the recommended speed of eight knots. On February 25, the tow encountered heavy seas, speed was reduced at this time, but the barge continued to take on water. After some time, and several speed reductions, the captain of the tug decided to head for Bahia Ballenas to pump out the barge. Bahia Ballenas was over one hundred miles away at this point, and the tug had to head into the northwesterly seas to reach it, while the port of Bahia Santa Maria was only about twenty miles away, and was due east of the tug and tow. Eventually, the captain changed course for Bahia Santa Maria, but it was too late, the straps on the barge gave way, the cargo tanks broke off the barge, and the barge was lost.

The trial court found that Dillingham, Salvage and N & S were liable for the loss of the *Columbia*, and apportioned their fault for the loss at 60%, 20% and 20% respectively. The Court further found that Union's recovery should be reduced by $1,000,000 for its failure to fully insure the barge, and that each defendant would be liable for its proportionate fault only.

## DISCUSSION

I. Effect of the Insurance Provision in the Towage Contract Between Dillingham and Union.

The towing contract entered into between Dillingham and Union contained a clause providing that Union would insure the *Columbia* to its full value with Hull and Machinery insurance. The insurance policy was to name Dillingham as an additional assured, with a waiver of right of subrogation against Dillingham. The provisions also required Union to look solely to its insurance for the recovery of any loss or damage to the barge.

Union argues that this provision is invalid under *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955). In *Bisso* the Supreme Court held that exculpatory provisions in towing contracts were invalid. Union argues that the insurance provision in this contract is merely an indirect exculpatory clause, since it effectively seeks to shield Dillingham from any liability for the loss of the barge.

The Supreme Court's holding in *Bisso* was based on two public policy factors. The Court wished to discourage negligence by making wrongdoers pay for damage they cause, and the Court also wished to protect those in need of goods and services from being overreached by others who have the power to drive hard bargains.[1] *Bisso* dealt with a pure

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[1] ***Bisso, supra,*** at 91.

exculpatory clause. That is not the case herein, though, and the public policy factors key to the holding in *Bisso* do not carry the same weight in the case of an insurance provision like the one at hand. In fact, there are public policy considerations in favor of such provisions.

The Fifth Circuit has previously considered this issue in several cases.[2] In *Fluor Western, Inc. v. G&H Offshore Towing Co.*, 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1972), a cargo owner had been required to get insurance under a provision similar to the one in question. The court held that the provision was valid, finding several distinctions between it and the exculpatory provision in *Bisso*. First, the court stated that there was no absolute exculpation under the provision; if the cargo owner couldn't collect from the insurer he could sue the tower. Union argues that this distinguishes the present case, because the provision appears to eliminate any suits against the tower, whether the insurer pays or not. However, this is not at issue in this case; Union was paid by its insurers for the full value of the barge, minus the $1,000,000 deductible. Whether the provision could shield Dillingham from liability in the absence of such a payment need not be determined.

The *Fluor Western* court went on to note that the contract containing the insurance provision did not bind the underwriters; they bound themselves in a separate agreement, and it was they who would have to bear the loss. The court did not see how any overreaching in the towing industry could have affected the underwriters. The only possible adhesiveness in the contract with regard to the cargo owner was

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[2]The only other circuit which has considered this question found an insurance provision to be unenforceable, saying it had not been bargained for, without giving further explanation. *PPG Industries v. Ashland Oil Co.*, 592 F.2d 138 (3rd Cir. 1978), *cert. denied*, 444 U.S. 830 (1979).

the requirement that he pay the premiums for the insurance, but the court found that public policy was not concerned with which party paid for the insurance.

*Fluor Western* was followed in *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir.), *cert. denied*, 419 U.S. 836 (1974). The court again noted that the provision in question did not shield the tower from all liability; he could still be liable for loss of use of the barge, or injuries to third persons. Similarly, in the case at hand, the Hull and Machinery insurance obtained would not have paid for loss of use, or injuries to third persons, so it did not shield Dillingham from all liability. Union notes that in *Twenty Grand* there were mutual insurance provisions; since both parties had to insure one another. Union claims that fact distinguishes the present case. However, in *BASF Wyandotte Corp. v. Tug Leander, Jr.*, 590 F.2d 96 (5th Cir. 1979), the court explicitly held that such mutuality was not required for the enforcement of such a provision.

We believe that the reasoning of the Fifth Circuit is sound, and that it is not against public policy to enforce an insurance provision in a towage contract. Furthermore, it is economically efficient to allow the enforcement of such provisions. The parties to a towage contract with such a provision are effectively insuring themselves under one policy against any loss due to the fault of either one of them, instead of each obtaining separate policies for this purpose. A single policy can be obtained cheaper than two individual policies. In the event of a loss, the same insurance company pays for the loss, despite who is at fault.

Union argues that even if such provisions are not invalid per se, this one should be held invalid because Union produced uncontradicted evidence of overreaching in the towing industry regarding such provisions. The trial judge found that there was no monopoly in the towing industry, and that

there had been no overreaching by Dillingham. The evidence to which Union refers was testimony by an employee of Dillingham that he couldn't recall ever negotiating a contract without such a provision (RT 270-271), and that other major towing companies also used such provisions (RT 272-273). Union also relies on the testimony by a Union employee that Dillingham refused to delete the provision from the contract (RT 532-3, 1537-8). This evidence does not justify a finding that the trial court was clearly erroneous. We uphold the trial court's finding that Union failed to meet their burden of establishing the existence of overreaching.

Having decided that the insurance provision in the towage contract should be enforced, we must determine what effect it has in this case. While finding that the insurance provision was enforceable, the trial judge still allowed Union to collect from Dillingham for its negligence in losing the *Columbia*. We find this to be error.

Normally, the right to sue a party responsible for a loss passes to an insurer once the insurer has paid for the loss. The trial court found that in this case, since a right of subrogation against Dillingham had been waived, and the insurer could therefore not sue Dillingham, the right to sue Dillingham remained with Union. The trial judge went on to rule that, under the collateral source rule, Union's recovery against Dillingham would not be reduced by the amount it had received from its insurer.

We disagree with the trial court's ruling for two reasons. First, the insurance provision in question explicitly provided that Union would look "solely to its Hull and Machinery insurance for the recovery of any loss or damage to the Barge." To allow Union to collect from Dillingham for its negligence violates this provision, which we have found to be enforceable. Second, the collateral source rule only applies to money received from "wholly independent" sources.

Union was required to purchase the insurance for Dillingham's benefit. Presumably, Dillingham gave up something in return. Therefore, the insurance payment was not a source wholly independent of Dillingham. In conclusion, to the extent that Union has been paid for its loss by its insurer, Union cannot now collect from Dillingham.

Since the policy under which Union insured the *Columbia* had a $1,000,000 deductible, Union's insurer did not pay for the full value of the barge. The trial court found that Union breached its agreement to insure the barge for its full value by insuring it with a $1,000,000 deductible, and concluded that Union therefore became a self insurer for this $1,000,000. We agree. Union argues that Dillingham either agreed to the deductible, or waived any objection to it. The contract provided that "[Union] shall maintain . . . insurance on the barge to its full value in form and amount satisfactory to [Dillingham]". Union argues that "full value" merely meant last dollar coverage and did not rule out a deductible. While some deductible might have reasonably been anticipated under the contract, we do not believe that insuring the barge for half its value was insuring it to "full value".

Union also argues that Dillingham waived any objection to the deductible because it was informed of the deductible prior to the commencement of the tow, and did not object until after the sinking. There was a dispute in the testimony as to when Dillingham was informed of the deductible, and the trial judge did not make a finding as to whether Dillingham was informed before or after the commencement of the tow. The trial judge concluded that whether they had been informed just prior to the tow, or after it had begun they did not waive their objection to the deductible. There does not appear to be any basis for concluding that the trial judge was clearly erroneous in making this finding.

II. Towing Fees and Panama Canal Fees.

The towage contract provided that towage fees "shall be deemed earned by Dillingham upon commencement of the voyage even though at any stage of the venture thereafter the barge or tug be lost. . . ." The trial court found that the contract contained an implied warranty to perform the serviced required in a workmanlike manner, following *Fairmont Shipping Corp. v. Chevron International Oil Co.*, 511 F.2d 1252, 1259-60 (2nd Cir.), *cert. denied*, 423 U.S. 838 (1975). The court further found that Dillingham had breached this implied warranty, and was therefore not entitled to its towing fees. However, the trial court did find that Dillingham was entitled to be reimbursed for the Panama Canal fees it had paid for the tow. Both Dillingham and Union agree that there is no reason why the Panama Canal fees should have been treated any differently than the towage fees, and there does not in fact seem to be any basis for making such a distinction. Since there is ample evidence to support the trial court's finding that Dillingham breached the implied warranty to perform the tow in a workmanlike manner,[3] the trial court was correct in refusing to allow Dillingham to collect its towing fees, but it erred in allowing Dillingham to collect the Panama Canal fees.

III. The Liability of N & S and Salvage.

N & S was retained by Union to design certain modifications in the river barge *Columbia* for a one time ocean tow from Galveston to Portland. N & S originally proposed

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[3]It is undisputed that Dillingham towed the barge in excess of the recommended speed, and failed to pump water out of the barge's hopper when it had an opportunity to do so. In addition, when it became obvious that the barge was in trouble, the tug headed directly into the pounding seas toward a port over 100 miles away, when another port was available at a distance of only twenty miles.

a cover for the open hopper of the barge, but, when Union complained about the expense of such a cover, N & S approved the elimination of such a cover, and instead recommended the addition of additional straps to hold the cargo tanks to the barge. N & S performed calculations indicating the stress on these straps with the hopper flooded in still water, and with the hopper empty in dynamic water conditions, but did not perform calculations as to the stress the straps would encounter with the hopper flooded in dynamic water conditions. The trial judge found that the failure to perform such calculations, or, if the calculations could not have been performed, the failure to inform Union of this fact, constituted negligence on the part of N & S.

The determination of negligence, as with other findings of fact by an admiralty trial court will not be reversed unless it is clearly erroneous. *Alkmeon Naviera, S.A. v. M/V Marina L*, 633 F.2d 798, 796 (9th Cir. 1980). There was ample testimony by experts at the trial to support the trial judge's finding of negligence,[4] and so this finding must be affirmed.

However, mere negligence alone does not give rise to liability, rather, the negligence must have caused the injury. "Without proof of causation there can be no liability." *Logsdon v. Baker*, 517 F.2d 174, 175 (D.C. Cir. 1975); " '. . . both negligence *and* causation must be proved before the plaintiff can have a verdict.' " *Becker v. Colonial Parking, Inc.*, 409 F.2d 1130, 1137 (D.C. Cir. 1969); " 'Negligence, in and of itself, is irrelevant in the absence

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[4]Allan T. Maris, Union's expert naval architect, testified that the calculations should have been performed, or that N & S should have informed Union that the calculations had not been performed. RT at 1324-1326. Richard A. Stearn, N & S's own expert naval architect, also admitted that these calculations should have been done (RT at 1745-46), and, that if any necessary calculations were unavailable, the barge owners should have been informed of this fact. RT at 1737.

of some causal connection with the injury.' " *Slatinsky v. Baily*, 330 F.2d 136, 138 (8th Cir. 1964). Causation, in this case, would necessitate a finding that, had the omitted calculations been performed, they would have demonstrated that the straps were not in fact sufficient for the contemplated voyage. The trial judge did make such a finding;[5] however, we believe that this finding was clearly erroneous.

In making this finding, the trial judge relied on post-accident computer printout results from a Coast Guard MMT-10 computer printout. This program was used to analyze stresses in conventional barges, but there was uncontradicted testimony from three experts that the program did not produce reliable results when applied to the modified *Columbia*.[6] It was clearly erroneous for the trial judge to base his finding on this concededly unreliable program.

N & S was not asked to turn the *Columbia* into an ocean-going barge; the modifications were only made to allow it to survive a single ocean voyage. The experts who testified at trial, including the expert called by Union, agreed that had Dillingham conducted the tow as they were advised to,

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[5]In Conclusion of Law No. 5, the trial judge stated that, "After the sinking, Mr. Nickum and Mr. Spaulding apparently were dissatisfied with the work and calculations their company performed prior to the sinking, as they had additional calculations performed on March 9th and 10th. These calculations showed the *straps were not sufficient*."

[6]Gordon C. Snyder, N & S's naval architect who made the recommendations concerning the modification of the *Columbia* testified that the MMT-10 program made the assumption that there was a supporting saddle under each strap location. However, the *Columbia*, as modified, had eleven unsupported straps, and so did not fit the assumptions of the program. RT at 979-981. N & S's expert, Mr. Stearn, stated that the failure of the MMT-10 program to take into account the lack of saddles under the added straps led to an erroneous printout. RT at 1724. Finally, Mr. Maris, Union's own naval architect, testified that he would be "very suspicious" of some of the numbers produced by the MMT-10 program as applied to the modified *Columbia*, and that this would cause him to "question both the program and the input data into the program." RT at 1364-66.

the barge would have survived the voyage, and therefore the barge was properly designed for the voyage contemplated by the parties.[7] If the *Columbia* were properly modified for the purpose of the contemplated voyage, then any negligence on the part of N & S in failing to make certain calculations was not the cause of the barge's sinking; the barge was lost due to Dillingham's failure to conduct the tow properly.

Since the trial judge found Salvage liable solely for a failure to discover N & S's negligence during its review of N & S's calculations, this finding was also clearly erroneous, and therefore must be reversed.

## CONCLUSION

The judgments as to Salvage and N & S are reversed. As between Union and Dillingham, the insurance provision at issue is enforceable. Union is responsible for the $1,000,000 deductible under the policy. We reverse the district court, however, as to Dillingham's liability for the amount which the insurer paid Union; Union must look solely to its insurer for recovery. Finally, the district court correctly found that Dillingham was not entitled to collect its towing fees from Union, but erred in awarding Dillingham its Panama Canal fees.

AFFIRMED in part and REVERSED in part.

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[7]Mr. Stearn, N & S's expert, testified that the *Columbia* as modified, "could safely complete the tow under the proper weather conditions and with the proper precaution being used when there was a sea condition arising." RT at 1732. David J. Seymour, an expert naval architect called by Dillingham testified that had the barge's hopper been kept dry, it would have made the voyage easily. RT 123-124. Finally, Mr. Maris, Union's own expert, testified, in response to questions from the Court, that the *Columbia*, at the commencement of the tow, was reasonably fit to make the voyage with proper handling (RT at 1333), and that it could have successfully completed the voyage with proper handling. RT at 1340, 1389.

## EXHIBIT 2.

### Order.

In the United States Court of Appeals for the Ninth Circuit.

Dillingham Tug & Barge Corporation, a corporation, Plaintiff-Appellee and Cross-Appellant, v. Collier Carbon & Chemical Corporation, a corporation, Defendant-Appellant and Cross-Appellee.

Union Oil Company of California, Third Party Plaintiff-Appellant and Cross-Appellee, v. Nickum & Spaulding Associates, Inc.; The Salvage Association, Third Party Defendants-Appellees and Cross-Appellants.

Nos. 81-4494, 81-4538, 81-4540, 81-4547. D.C. # 77-1654 WAI.

Filed: September 6, 1983.

Before: TANG and ALARCON, Circuit Judges, and KENYON*, District Judge.

The court has considered Union Oil Company of California's Petition for Rehearing. The Petition for Rehearing is denied.

It is further ordered that the parties each shall bear his own costs upon the appeal.

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*Honorable David V. Kenyon, United States District Judge for the Central District of California, sitting by designation.

## EXHIBIT 3.

### Judgment.

United States District Court, Northern District of California.

Dillingham Tug & Barge Corporation, a corporation, Plaintiff, vs. Collier Carbon & Chemical Corporation, Defendant.

Union Oil Company of California, Third-Party Plaintiff, vs. Nickum & Spaulding Associates, Inc., The Salvage Association Limited, and Todd Shipyard Corporation, Third-Party Defendants and Cross-Complainants.

Entered in Civil Docket 3-2-1981.

Civil No. C-77-1654-WAI.

Filed: March 2, 1981.

William L. Whittaker, Clerk.

This cause having come on for final hearing on the pleadings and proof and having been taken under submission, the Court after due deliberation having entered its Findings of Fact and Conclusions of Law, it is ORDERED, ADJUDGED and DECREED that a Judgment in the amount of EIGHT HUNDRED SIXTEEN THOUSAND, TWO HUNDRED FORTY-FIVE AND 28/100 DOLLARS ($861,245.28), be, and hereby is, entered in favor of Defendant-Cross-Claimant, Collier Carbon & Chemical Corporation and against the Plaintiff-Cross-Defendant, Dillingham Tug & Barge Corporation and Third-Party Defendants, Nickum & Spaulding Associates, Inc. and The Salvage Association, Limited, in the following proportions: 60% against Dillingham, 20% each against Nickum & Spaulding and The Salvage Association; this together with interest thereon at the rate of seven and one-half percent (7-1/2%) per annum, from February 25, 1977,

until paid.

It is FURTHER ORDERED, ADJUDGED and DECREED that a Judgment in the amount of NINE THOUSAND, SEVEN HUNDRED THIRTY-SEVEN AND 40/100 DOLLARS ($9,737.40) be, and hereby is, entered in favor of plaintiff, Dillingham Tug & Barge Corporation and against defendant, Collier Carbon & Chemical Corporation, together with interest thereon at the rate of seven and one-half percent (7-1/2%) from March 29, 1977, until paid.

DONE this the 26th day of February 1981.

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

## EXHIBIT 4.

### Findings of Fact and Conclusions of Law.

United States District Court, Northern District of California.

Dillingham Tug & Barge Corporation, a corporation, Plaintiff, vs. Collier Carbon & Chemical Corporation, Defendant.

Union Oil Company of California, Third-Party Plaintiff, vs. Nickum & Spaulding Associates, Inc., The Salvage Association, Limited, and Todd Shipyard Corporation, Third-Party Defendants and Cross-Complainants.

Entered in Civil Docket 3-2-1981.

Civil No. C-77-1654-WAI.

Filed: March 2, 1981.

William L. Whittaker, Clerk.

This action came on to be heard by the Court on September 16, 1980, and the Court makes the following Findings of Fact and Conclusions of Law:

*FINDINGS OF FACT*

1. Plaintiff Dillingham Tug & Barge Corporation (Dillingham), formerly Hawaiian Tug & Barge Co., Ltd (HT&B), is the owner of the tug MOANA HOLA.

2. Defendant and Third-Party Plaintiff Collier Carbon & Chemical Corporation (Collier), a division of Union Oil Company of California (Union) was the owner of Barge 2506, known as the COLUMBIA.

3. Third-Party Defendant Nickum & Spaulding Associates, Inc. (Nickum & Spaulding) is a firm of naval architects and marine engineers practicing in Seattle, Washington, having performed professional services on behalf of Collier in connection with the preparation for the tow of the

barge COLUMBIA from Galveston to Portland.

4. Third-Party Defendant, The Salvage Association, Limited (Salvage Association), is a firm of professional surveyors with offices throughout the world with the Houston Office of Salvage Association having performed services on behalf of Collier in connection with the tow of the COLUMBIA.

5. Third-Party Defendant Todd Shipyard Corporation (Todd) performed modifications specified by Nickum & Spaulding on the COLUMBIA on behalf of Collier in connection with the single ocean tow from Texas to Oregon through the Panama Canal.

6. In 1971, Collier purchased the HEDGES, an open-hopper river barge operating on the Mississippi River. The HEDGES carried two insulated tanks used for transporting anhydrous ammonia and was equipped with a cover for the tanks and hopper. Collier planned to use the HEDGES on the Columbia River. Collier arranged with Nickum & Spaulding to design modifications for the HEDGES so it could be towed from the Gulf through the Pacific to Portland, Oregon. After the modiciations were completed, the HEDGES was successfully towed to the Columbia River by Foss Tug & Barge (Foss), a subsidiary of Dillingham.

7. In May 1976, Collier purchased another open-hopper river barge operating on the Mississippi River. This barge, the COLUMBIA, was designed and equipped similarly to the HEDGES. It was 300 feet in length and carried two insulated tanks, each 280 feet in length by 18 feet in diameter, but unlike the HEDGES, the COLUMBIA lacked a hopper cover.

8. On July 16, 1976, Collier retained Nickum & Spaulding to prepare plans and specifications for modification of the COLUMBIA to permit a one-time, no cargo ocean de-

livery tow from Galveston to Portland. This modification was required because the COLUMBIA was originally built for river traffic only and was not sufficiently structured to qualify for service as an ocean-going barge. Nickum & Spaulding completed its assignment in time for Collier to submit the project for bids on October 1, 1976. Nickum & Spaulding also completed an "Analysis of Longitudinal Strength and Intact and Damages Stability" which, with the modification plans, was submitted to the U. S. Coast Guard and the American Bureau of Shipping (ABS) for approval, which approval was obtained.

9. Collier received two bids for the modification of the COLUMBIA, which including adding a hopper cover. The lowest bid was $784,000, made by Todd. Collier, considering the bid to be excessive, sought to reduce the cost of modification by alteration of the modification. It consulted with Nickum & Spaulding on November 16, 1976, as to whether the proposed hopper cover could be eliminated to reduce modification cost.

10. After contacting the Coast Guard and the ABS, Nickum & Spaulding determined that neither of these organizations had any objection to the proposed tow proceeding without a cover. They also obtained conditional approval for the one-time tow from the Coast Guard.

11. Nickum & Spaulding undertook to calculate the effect on the barge's seakeeping performance that would be created by a flooding of the hopper, a possibility which could occur because of the elimination of the hopper cover. On November 19, 1976, they advised Collier that the hopper cover could be eliminated if additional tie-down straps were installed to insure that the barge would remain afloat even if the hopper became fully flooded with water. They never advised Collier that there was an increased risk by removing the cover nor did they advise Collier that the calculations

were incomplete in any way or that proper calculations were not performed.

12. Because Collier needed approval of a salvage association in order to obtain insurance on the tow, they contracted with the Salvage Association to perform the insurance approval survey.

Collier's contract with the Salvage Association contained the following clause:

> The Salvage Association London believes that the surveyor appointed by them is fully competent to carry out this survey but the resultant certificate will be issued on the express condition that neither the Salvage Association London nor the surveyor shall in any circumstances be responsible or liable to any person for any act or omission, default or negligence of the surveyor in the conduct of the survey or the contents of the certificate or for any situation or event which may occur subsequent to the issue of the certificate.

13. The Salvage Association undertook to determine whether or not the barge, the tug and the towing arrangements were satisfactory for the contemplated tow of the COLUMBIA from Galveston to Portland. They prepared instuctions for Collier as to how to adequately prepare the COLUMBIA for the voyage and included instructions requiring that suitable calculations be made concerning the strength of the COLUMBIA in both "hopper dry" and "hopper flooded" conditions.

14. In December 1976, negotiations began between Collier and Dillingham for the tow of the COLUMBIA from Galveston to Portland by the newly constructed tug MOANA HOLO, then in the Gulf area, which would be in service in and around Hawaii after this initial tow. As a model for a contract for COLUMBIA tow, the companies used the 1971 HEDGES contract between Foss and Collier.

15. On January 19, 1977, Dillingham and Collier entered into a towage agreement by which Dillingham agreed to tow the COLUMBIA from Galveston to Portland. Under the terms of the contract, Collier agreed to pay Dillingham $125,000 for the towage service to "be deemed earned by HT&B upon the commencement of the towage service even though at any stage of the venture thereafter the barge be lost." The contract further "provided that HT&B shall have due regard to the recommendation of the Salvage Association." It also provided that "neither HT&B nor the tug shall be responsible for the loss of . . . the barge . . . arising from act, neglect or fault of the master . . . or the servants of HT&B in the navigation or in the management of the tug, tow or towing equipment, . . . and any other cause arising without the actual fault and privity of HT&B and without the fault or negligence of the agents or servants of HT&B."

16. Collier contracted to "indemnify, defend and hold harmless HT&B . . . against all claims, liabilities, loss or expense, including costs and attorneys' fees arising out of or connected with . . . loss of . . . the barge unless such shall have been due to the sole fault of HT&B."

17. The towage contract also provided that "Collier shall maintain hull and machinery and protection and indemnity insurance on the barge to its full value in form and amount satisfactory to HT&B and such policies shall be endorsed with waiver or subrogation against HT&B and the tug and shall name HT&B as an additional assured (sic) with loss payable to Collier," with Collier looking "solely to its hull and machinery insurance for any loss (of) . . . the barge."

18. Collier listed the COLUMBIA on Union's fleet policy, which policy had a $1,000,000 deductible, but was unable to name HT&B as an additional insured. It is disputed

whether Collier advised HT&B of the deductible and of its inability to name HT&B as an additional insured during a telephone conversation on February 23, 1977, four days before the commencement of the tow. Collier did confirm these facts in a letter dated January 27, 1977, but it is contended by Dillingham that this letter did not arrive until after commencement of the tow on January 29, 1977.

19. The Salvage Association, in conducting its survey, undertook to review the plans and specifications designed by Nickum & Spalding. They employed an independent naval architect to review the calculations to determine whether or not there was sufficient stability of the barge to successfully complete the tow.

20. The Salvage Association performed the survey and after being advised by their independent naval architect that the calculations of Nickum & Spaulding were sufficient, approved the tow and provided towing recommendations to Collier and to Dillingham's tugboat captain, Anthony Schaeffer. These recomendations included the following:

(1) Daily reports from the tug on the condition of the barge were to be made to the Salvage Association;

(2) Collier and the Salvage Association were to be immediately advised of any unusual condition of the tow;

(3) The towing speed was not to exceed 8 knots and if weather conditions requires it, the towing speed was to be reduced to eliminate any possible damage to the barge; and

(4) The crew of the tug was to check out the condition of the barge periodically in order to assure that it had not taken on water, and, if it had, the water was to be pumped out immediately.

21. After modifications were completed by Todd and prior to the COLUMBIA's departure from Galveston, the

barge, including its pumping equipment, was checked by Captain Schaeffer of Dillingham's MOANA HOLO and by representatives of Collier, Todd and the Salvage Association.

22. On January 22, 1977, the COLUMBIA in the tow of the MOANA HOLO commenced its voyage from Galveston in route to Portland via the Panama Canal. At that time, the COLUMBIA was ballasted with a forward draft of 5′0′ and an aft draft of 6′09′. One foot high white lines were painted on the COLUMBIA's corners at the water line in order for the tug crew to more easily determine if the barge was sitting lower in the water as a result of water in the hopper.

23. On February 7, 1977, the tug and tow arrived in Cristobal, Panama Canal Zone, at which time the tug crew attended on board the COLUMBIA for the first time since the voyage began. The forward compartment of the hopper contained between one and three feet of water. The surveyor for the Salvage Association in Panama recommended that the water in the hopper be pumped out before proceeding further. While his survey report states that it was pumped out, the evidence clearly shows the contrary.

24. Even though Panamanian officials refused to allow water to be pumped into the Canal, the tug crew attempted unsuccessfully to use the portable bilge pumps on board the COLUMBIA to pump out the accumulated water. They never attempted to use the built-in bilge system on the COLUMBIA nor did they attempt to correct the problem with the portable system by obtaining longer hoses. As a result, the water in the forward compartment of the COLUMBIA's hopper was never removed. The COLUMBIA left Balboa, Panama Canal Zone, on February 13, 1977, with the forward draft of 5′6″ and an aft draft of 6′7″.

25. From February 13, 1977, through February 25, 1977, the tug logged the following average ground speeds:

8.6 knots, 9.1 knots, 8.4 knots, 9.3 knots, 9.2 knots, 8.33 knots, 8.6 knots, 8.3 knots, 8.4 knots, 9.3 knots, 9.1 knots, 8.66 knots and 7.5 knots. From noon February 15, 1977, through noon February 25, 1977, the average speed of the tug through the water was 8.3 knots.

26. On February 20, 1977, the tug and tow put into Acapulco because of a problem with the fresh water system aboard the MOANA HOLO. At no time while in Acapulco was any attempt made to pump out water which had collected in the COLUMBIA's hopper although the tug and tow remained in Acapulco for 22 hours and pumping could have been accomplished.

27. On February 25, 1977, at 0300 and then at 0715, Captain Schaeffer reduced speed from 900 rpm's because the tug and tow were "pitching hard rough (northwesterly) swells" as they encountered "heavy sea (from) head on" causing "heavy strain on (the) tow gear".

28. At 0730, when Second Mate Malina took command, he noticed that the barge was taking heavy spray into the hopper, that it was possibly taking green waves, that it was pounding and diving and that the bow of the barge was down to a point where he could not see the white waterline which had been painted on the COLUMBIA. At that time, Bahia Santa Maria, a possibly suitable port of refuge, was approximately 20 miles north-northwest of the tug and tow. At 0742, Second Mate Malina reduced the speed of the tug to 800 rpm's "due to heavy seas (from the northwest)." No change in direction was made at this time.

29. At 0900 the tug and tow made a normal course change from 316 degrees to 320 degrees, continuing in a basically northwesterly direction. At 1030 the tug contacted KCR in Long Beach to give an "ETA Long Beach 1 March 1980".

30. At 1120 Second Mate Malina reduced the speed of the tug to 720 rpm's "due to heavy (northwesterly) seas", but noticed that the tow continued to take spray. At 1215 he further reduced the speed of the tug to 650 rpm's.

31. At 1235 Captain Schaeffer determined the "bow of (the) COLUMBIA (was) down" and changed course north-northwesterly to 345 degrees to "head for Bahia Ballenas to pump out (the) bow" of the COLUMBIA. At that time Bahia Ballenas was over 100 miles away and into the northwesterly seas, while Bahia Santa Maria was closer and due east of the position of the tug and tow.

32. At 1305 the "port cargo tank on (the) barge COLUMBIA (had) broken loose" and the "barge (was) listing to port heavily". At that time Captain Schaeffer made a course change to 100 degrees heading easterly to Bahia Santa Maria. At 1345 he made a slight course change to 110 degrees "to avoid a 6 fathom mark". At 1400 the tug logged an unexplained 810 rpm's. At 1430 another course change was made to 90 degrees. At 1517 the "port cargo tank (apparently broke completely loose and was) carried away and . . . float (ed) astern of the barge COLUMBIA"

33. At 1530 the tug attempted unsuccessfully to contact the U. S. Coast Guard in San Francisco. At 1540 the tug contacted KCR to report "port cargo tank broken loose — pos(sible) hazard to Nav(igation) — Pro(ceeding) to San Lorenzo."

34. At 1656 the log showed the "starboard tank broke away" and was "drifting (southwesterly)."

35. At 1850, while heading to Bahia Santa Maria with the barge, the tug, "slow(ed) down (and) turn(ed) right to avoid (an) oncomming (sic) fishing vessel." As a result at 1900 the "barge COLUMBIA went down" and the tug "sliped (sic) (the) starboard tow cable 41 miles from San

Larazo." The Captain testified that he ordered the cable slipped, even though he had no instructions to do so, because of the danger if presented the tug.

36. The MOANA HOLO remained in the vicinity of the sunken barge to police the area and to search for the tanks visually and by radio contact with other vessels. On February 26, the Captain determined that the sunken barge was no danger to navigation, even though it sank with the bow up. He reported that there was no success in finding the tanks. On February 27, the MOANA HOLA left the area to continue its voyage to Long Beach.

37. When the MOANA HOLA reached Oakland she secured a substitute tow from Oakland to Oregon for which she was paid $20,000.00.

38. Collier obtained a replacement barge which was then in service on the Mississippi River. This barge was similar to the sunken barge. It was successfully piggybacked from the Gulf to Portland for a total cost of $2,573,339.89.

*CONCLUSIONS OF LAW*

1. This Court has jurisdiction since the causes of action herein constitute admiralty and maritime claims for relief under Rule 9(h) of the Federal Rules of Civil Procedure.

2. The sinking of the barge Columbia was due in part to the negligence of the Captain and crew of the tug MOANA HOLA. A tug has the duty to inspect the barge in her tow and to keep the barge under close observation while under tow. *McDonough Marine Service, Inc. v. M/V ROYAL STREET*, 465 F.Supp. 928, 934 (E.D. La. 1979); *Dwyer Lighterage, Inc. v. Christie Scale Corp.*, 1951 AMC 946 (E.D. N.Y. 1951); *A. G. Staley Manufacturing Co. v. Porto Rico Lighterage*, 323 F.Supp. 27 (E.D. La. 1970), aff'd per curiam, 438 F.2d 1 (5th Cir. 1971).

The degree of care of the tug is measured with reference to the character of the tow and conditions of the sea and weather. *Ocean Burning v. Moran Towing and Transportation*, 1974 AMC 2307 (S.D. N.Y. 1974). Under the facts of this case, it was negligence to allow the barge to become so full of water that it was down by the bow. *McDonough Marine Service, Inc. v. M/V ROYAL STREET, supra*; *Mississippi Valley Barge Line v. T. L. James Co.*, 1956 AMC 2186 (E.D. La. 1956), aff'd 1957 AMC 1647 (5th Cir. 1957).

3. The Court does find that the barge was unseaworthy for the anticipated one-time tow; however, even if it was, the towing vessel would be liable in negligence if it continued to proceed when the unseaworthiness of the vessel was disclosed. As set out in Findings of Fact 28 through 35, it was apparent at 0730 on February 25, 1977, that the barge was in peril. She was then approximately 20 miles north northwest of Bahia Santa Maria. The condition worsened and at 1235 instead of heading for Bahia Santa Maria, Captain Schaeffer decided to head for Bahia Ballenas which was over 100 miles away. While the Court recognizes the fact that the Captain's judgment must be respected in extremis situations, it is very difficult to understand why the Captain sought to seek shelter in a harbor over 100 miles away when one was available one-fifth of that distance. In fact, at 1305 the Captain did decide to head for Santa Maria, but by this time the barge was beyond saving. *McDonough Marine Service, Inc. v. M/V ROYAL STREET, supra; Otto Candies, Inc. v. Great American Insurance Co.*, 221 F.Supp. 1014 (E.D. La.), aff'd per curiam, 332 F.2d 372 (5th Cir. 1964). This negligence of Dillingham contributed to the sinking of the COLUMBIA by 60%.

4. The exculpatory provisions contained in the towage agreement between Collier and HT&B were stricken down

by Magistrate Rothwell in his ruling of November 22, 1977. The Court joins in the reasoning of Magistrate Rothwell in striking down those provisions under the law as stated in *Bisso v. Inland Water Corp.*, 349 U.S. 85 (1955). The United States Supreme Court in *Bisso* held that the requirement placing the "sole risk" of the tow on the barge was invalid. The exculpatory provisions in this towage contract are likewise invalid.

While the exculpatory provisions contained in the towage agreement have been stricken as decreed in *Bisso*, nevertheless, the insurance provision falls within *Twenty Grand Off-Shore vs. West India Carriers, Inc.*, 492 F.2d 679 and is valid. With reference to the insurance provision in the towage agreement, see Findings of Fact 17. Collier did not insure the barge for full value, but covered it under its fleet policy which had a million dollar deductible clause. The barge at the time of the sinking had a value of $1,901,245.28. By placing the barge in its fleet policy with the million dollar deductible clause, Collier became a self-insurer for the million dollars. Collier solicited bids from several tow boat companies before entering into the agreement with Dillingham. See Page 000127, *et seq*, of the transcript of September 24, 1980. The evidence shows that there was no monopoly of the tow boat market or that there was any form of a monopolistic agreement among tow boat operators. There was no evidence that the barge owner was overreached by the tug owner or that the tug owner was in a position to drive hard bargains. The tug owners liability to the barge owner is unaffected by the insurance clause. As stated in *Twenty Grand, supra*, "The simplistic, syllogistic approach of the barge owner is inviting because we agree with the major premise that *Bisso* condemns exculpatory clauses that relieve the legal liability of a negligent tower. But the minor premise that compulsory insurance clauses are exculpatory,

*per se*, in the context of *Bisso*, is unsound. Such a doctrinaire interpretation is not supported by the reasons undergirding *Bisso*." The Court therefore limits Collier's recovery regardless from whom to $901,245.28.

5. Nickum & Spaulding were requested to perform certain calculations for preparation of the barge for the tow. The problem presented was unique. They undertook to calculate the effect of the barge's seakeeping performance that would be created by a flood of the hopper, a possibility which could occur because of the elimination of the hopper cover. As stated in Findings of Fact 11, they advised Collier that the hopper cover could be eliminated if the additional tie-down straps were installed to insure that the barge would remain afloat even if the hopper became fully flooded with water. They never advised Collier that the calculations they made were incomplete in any way or that proper calculations were not performed. (See testimony of Snyder of Sep. 19, 22, and 23, 1980, and particularly pages 69, 70, and 71 of the transcript of Sep. 19, 1980.) After the sinking, Mr. Nickum and Mr. Spaulding apparently were dissatisfied with the work and calculations their company performed prior to the sinking, as they had additional calculations made on March 9th and 10th. These calculations showed the *straps were not sufficient*. It is true that these calculations were performed over the objections of Mr. Snyder and he did not agree with the results. (See pages 69, 70 of the transcript of Sep. 19, 1980.) The errors in calculations and particularly the failure to advise Collier, constituted negligence on the part of Nickum & Spaulding which directly contributed to the loss of the Barge COLUMBIA BY 20%.

6. A surveyor is charged with the duty of using due care in making his recommendations and of detecting all perceptible defects of the vessel encountered during the survey and notifying the owner thereof. *Great American*

*Insurance Co. v. Bureau Veritas*, 338 F.Supp. 999 (S.D. N.Y. 1972), aff'd, 478 F.2d 235 (2d Cir. 1973); *Steamship Mutual Underwriters v. Bureau Veritas*, 380 F.Supp. 482 (E.D. La. 1973). The Salvage Association expressly undertook to determine whether or not the barge, the tug, and the towing arrangements were suitable for the anticipated one-time tow from Galveston to Portland. See Finding of Fact 13. To this end, the Salvage Association made specific recomendations and required that certain calculations be made to determine *if the barge had sufficient stability* to complete the tow. See Findings of Fact 13, 20. Thereafter, the Salvage Association undertook to review the calculations of Nickum & Spaulding to determine if the calculations were proper. In undertaking to perform these additional services, the Salvage Association was required to perform them in a non-negligent manner.

The Salvage Association then delegated this review of the calculations to an independent naval architect, David Waller. See Finding of Fact 19. The responsibility of performing the review, though delegated to Waller, was still with the Salvage Association. If the Salvage Association determined that the calculations were improper, it had the duty to inform Collier of this apparent "defect." By relying on Mr. Waller for its assumed duty to review the calculations, the Salvage Association was responsible for any errors or omissions of the naval architect whom it hired. The Court realizes that in general an independent contractor's negligence can be avoided by his employer. Under the facts of this case, however, the Salvage Association hired an independent contractor to perform a job which it knew was vital to the survey. By undertaking to review the calculations of Nickum & Spaulding, the Salvage Association assumed duties not normally performed by a surveyor. The Court finds that this responsibility could not be delegated to its

independent naval architect. If the review was negligently performed, which this Court holds it was, that negligence is attributable to the Salvage Association.

The Court, therefore, finds that the Salvage Association breached a duty which it had expressly and implicitly undertaken. The review of the calculations of Nickum & Spaulding was negligently performed. Had proper review been made, the Salvage Association would have then had the duty to inform Collier that the calculations were in error and that the tow should not proceed. This breach of duty, which resulted in the tow being approved for the voyage, contributed to the loss of the barge in a manner similar to Nickum & Spaulding and in a similar percentage of 20%. The exculpatory provisions in the Salvage Association's survey are unenforceable as being contrary to *Bisso*. The Salvage Association's claim for attorney's fees is without merit.

7. Todd settled out of court with Collier and Collier assumed Todd's defense to all cross-claims on which the Court finds no liability.

8. Paragraph 5 of the Towage Agreement, Plaintiff's Exhibit 1, provides as follows: "Port charges, Panama Canal fees, customs' fees, assisting tugs and any wharfage chargeable in connection with the towage of Collier's barge shall be paid by Collier." The Court has heretofore held that the towage agreement was violated due to Dillingham's negligence. Nevertheless the flotilla did transit the Panama Canal and incurred fees and expenses in the amount of $9,737.40, which were paid by Dillingham and for which Dillingham is entitled to recover, plus interest at the rate of 7-½% per annum from March 29, 1977, until paid.

9. The towage agreement in Paragraph 2, provides in part:

"HT&B shall be paid $125,000.00 for the towage service, which sum shall be deemed earned by HT&B upon commencement of the towage service even though at any stage of the venture thereafter the barge or tug be lost or become unfit to continue to designation. . . ."

As Justice Black in *Bisso* states: "The question presented is whether a tow boat may validly contract against all liability for its own negligent towage." 349 U.S. at 85. *Bisso* answered in the negative. It struck down a contract releasing towers from all liability for their negligence as against public policy. *Bisso* also held that, "Contractual exemption of a tow boat from responsibility for its own negligence cannot be defeated by the simple expedience of providing in a contract that all employees of a tow boat shall be employees of the towed vessel. . . ." 349 U.S. at 95.

Bisso also holds that you cannot contract against your own negligence. The barge in this instance was lost due primarily to negligent towage. If it is against public policy to contract against your own negligence, it is also against public policy to profit from your own negligence which in this case would be collecting the towage.

While the towage agreement does its utmost to relieve HT&B of all responsibility, nevertheless, the last sentence in paragraph 4 limits this protection provided it is "without the fault or negligence of the agents or servants of HT&B." It is also interesting to note that in paragraph 8 of the towage agreement, HT&B recognizes that there are instances in which it could be liable and it attempts to protect itself by the limitation statutes of the United States. While I have found no cases dealing specifically with the terms of this contract, providing that the fees are earned at the commencement of the towage service even though the barge is lost, I am cognizant of the cases of *Shebby Dredging Co. v. Smith Bros., Inc.*, 469 F.Supp. 1279 (D. Md. 1979);

*Mississippi Valley Barge Line Co. v. T. L. James*, 144 F.Supp. 662 (E.D. La. 1956); and, *The Anita D.*, 28 F.Supp. 361 (E.D. La. 1939). All of these cases involved payment of towage fees and held that they were earned, but in all three cases, it is specifically held that the tower had performed the services agreed to in the contract. While the towage contract in this case does not specifically provide that HT&B will perform the services in a workmanlike manner, it certainly must be held to that standard. See, *Fairmont Shipping Corp. v. Chevron International Oil Co.*, 511 F.2d 1252 (2d Cir. 1975), especially page 1259 under headnotes 2-4. Consequently, Dillingham is not entitled to any compensation under the towage agreement other than the expenses it incurred in transiting the Panama Canal.

10. Todd, in its compromise settlement with Collier, paid $85,000.00 which necessarily reduces by this amount any recovery to which Collier is entitled from Dillingham, Nickum and Spaulding and Salvage Association.

11. The Court further finds that Collier is entitled to interest on its recovery from February 25, 1977, until paid, at the rate of 7-½% per annum. *Mobile Towing and Wrecking Co. v. Dredge*, 29 F.Supp. 348.

12. In summary, the Court makes the final allocations of Collier's damage:

| | | |
|---|---|---|
| 1. | Value of the COLUMBIA | $1,901,245.28 |
| 2. | Less deductible | 1,000,000.00 |
| 3. | Less payment by Todd | 85,000.00 |
| 4. | Amount of Judgment | 816,245.28 |

plus interest at the rate of 7-½% per annum from February 25, 1977, until paid.

This Judgment is to be allocated among the parties for the following percentages:

| | | |
|---|---|---|
| 1. | Dillingham | 60% |
| 2. | Nickum & Spaulding | 20% |
| 3. | Salvage Association | 20% |

In accordance with the above Findings of Fact and Conclusions of Law, Judgment will be entered.

2/26/81

/s/ Daniel H. Thomas
UNITED STATES DISTRICT JUDGE

## EXHIBIT 5.

### Supplemental Findings of Fact and Conclusions of Law.

United States District Court, Northern District of California.

Dillingham Tug & Barge Corporation, a corporation, Plaintiff, vs. Collier Carbon & Chemical Corporation, Defendant.

Union Oil Company of California, Third-Party Plaintiff, vs. Nickum & Spaulding Associates, Inc., The Salvage Association, Limited and Todd Shipyard Corporation, Third-Party Defendants and Cross-Complainants.

Civil No. C-77-1654-WAI.

Filed: September 17, 1981.

On February 26, 1981, this Court entered a Judgment in favor of the defendant and third-party plaintiff, Collier Carbon & Chemical Corporation, and against the plaintiff, Dillingham Tug & Barge Corporation and the third-party defendants, Nickum & Spaulding Associates, Inc. and The Salvage Association, Limited, on a proportionate fault basis for $861,245.28. On March 11, 1981, Dillingham filed a motion pursuant to the Federal Rules of Civil Procedure 52(b) and 59(e) to alter or amend the judgment.

Under the aforementioned rules the district court may make supplemental findings and conclusions and may modify the judgment originally entered. *McCraw v. Simpson*, 141 F.2d 789 (10th Cir. 1944); *Feinstine v. Rosenfield*, 111 F.2d 892 (7th Cir. 1940). This Court has reviewed the original findings and conclusions and hereby supplements them where deemed appropriate.

1. Original Finding of Fact 12 is deleted and the following is submitted in lieu thereof:

Because Collier needed the approval of a surveyor designated by the underwriters' policy or of a salvage association in order to obtain insurance on the tow, they contracted with the Salvage Association to perform the insurance approval survey.

2. Original Finding of Fact 18 is deleted and the following is substituted in lieu thereof:

Collier listed the COLUMBIA on Union's fleet policy, which policy had a $1,000,000 deductible. Although HT&B was named an additional insured on the hull and machinery policy ("Hull") with a waiver of subrogation by Union's underwriters, Collier was unable to have HT&B named as an additional insured on its protection and indemnity policy ("P & I"). It is disputed whether Collier advised HT&B of the deductible and of its inability to name HT&B as an additional insured on its P & I policy during a telephone conversation on February 23, 1977, four days before the commencement of the tow. Collier did confirm these facts in a letter dated January 27, 1977, but it is contended by Dillingham that this letter did not arrive until after the commencement of the tow on January 29, 1977.

3. In the original Findings of Fact, there was a failure to mention that Collier was paid $1,000,000 by its underwriters under the Hull policy. This amount represents the value assigned by the insurer above the $1,000,000 deductible.

4. Dillingham contends that it is entitled to recover for towing pursuant to the terms of the contract even if acts or omissions of Dillingham caused or contributed to damage to the barge. For this proposition, Dillingham has cited *Foss Launch & Tug Company v. The Kukui*, 130 F.Supp. 180 (N.D. Cal. 1955). This Court is of the opinion that the *Foss* case does not hold as Dillingham wishes it to hold.

The Court finds that its original Conclusion of Law 9 which discussed the towage fee agreement and concluded that Dillingham was not entitled to collect its fee is correct. The Court's original Conclusion of Law 3 addressed this very issue. The Court, finds that the towage agreement was violated due to Dillingham's negligence and that this breach of contract precludes recovery of the towage fee.

5. Dillingham in its motion to alter or amend its judgment, sets out three grounds; namely, that the judgment be amended so as to: (1) hold that Dillingham was a named insured of Collier's hull and machinery insurance policy and therefore no recovery can be had by Collier or its underwriters against Dillingham; (2) hold that Dillingham is entitled to recover in full from Collier the unpaid towage charges and expenses in connection with the towage of the Barge Columbia and; (3) to deny recovery against Dillingham on the cross-complaints of Nickum & Spaulding Associates, Inc. and the Salvage Association, Ltd.

As to the first ground, Dillingham sets out Article 7 of the towage agreement, namely:

> 7. Collier shall maintain Hull and Machinery and Protection and Indemnity insurance on the Barge to its full value in form and amount satisfactory to HT&B, and such policies shall be endorsed with waiver of subrogation against HT&B and the tug and shall name HT&B as an additional assured with loss payable to Collier. Collier shall look solely to its Hull and Machinery insurance for the recovery of any loss or damage to the Barge. . . .

Dillingham argues that since Collier had been paid for its loss (minus the self insurance deductible) all of Collier's rights against third-parties pass by subrogation to its insurers and none remained in Collier and that since Collier was reimbursed by its hull and machinery insurance, and that

the Court's judgment permits subrogation for an insurer against one of its own named insureds. With this argument, the Court does not agree.

It is undisputed that Collier's insurers waived any claim that they may have ordinarily had against Dillingham. Since Collier's insurers have waived their right to seek subrogation of Collier's claims against Dillingham those rights remain with Collier and are not extinguished simply because Collier has received some compensation for its losses.

6. As to Dillingham's second alleged error, this has been fully covered both in paragraph 4 above and in the Court's original Findings of Fact and Conclusions of Law and requires no further comment.

7. As to Dillingham's third proposition, the cross-complaints of Nickum & Spaulding Associates, Inc. and Salvage Association, Ltd. against Dillingham are without merit as will be further discussed in this memorandum opinion.

8. Collier in motion and brief, alleges that the relationship between Dillingham and its insurers should in nowise limit Collier's right to recover its full loss against Salvage Association and Nickum & Spaulding. It argues that the original Findings and Conclusions should be amended and that a judgment in favor of Collier should be entered jointly and severally against the Salvage Association, Nickum & Spaulding and Dillingham for the full amount of Collier's loss. It contends that there is a joint tort feasor relationship and that Collier could go against any one of them for the full amount. Collier alleges in its brief, "with respect to Dillingham, the contractual defenses raised against Collier by Dillingham are of no value in defending against the cross-claims for contribution filed by the Salvage Association and Nickum and Spaulding". This argument completely dis-

regards the holding in *U.S. v. Reliable Transfer Co.*, 421 U.S. 397. As stated in *Reliable Transfer, supra*, "We hold that when two or more parties have contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the comparative degree of their fault, . . ." While *Reliable Transfer* uses the phrase "maritime collision or stranding", *Reliable* has been expanded beyond this narrow interpretation. *See, Creole Shipping v. Diamandis Pateras*, 1977 AMC 189, *Kavieros Oceanikos v. Mobile Trader*, 1977 AMC 749; *Hanover Ins. v. Puerto Rico Lighterage Co.*, 553 F.2d 723; *Griffith v. Wheeling Pitt Steel Co.*, 521 F.2d 31; *Hogge v. SS YORKMAR*, 1977 AMC 805, and other cases.

The Second Circuit in the case of *Gerry Oil Co., Inc. v. SS Ponce de Leon*, 555 F.2d 328, states on page 333, "We can only conclude that the *Reliable* stands for the proposition that in cases such as this, the district court is obliged to apportion the damages even if one vessel is primarily responsible for the loss and the other is only slightly negligent." I think in the case at bar, *Reliable Transfer*, as far as damages are concerned, is directly on point. It puts this entire matter at rest.

9. *Cooper Stevedoring Co. v. Kopke, Inc.*, 117 U.S. 106, in discussing the question of contribution between tort feasors is dealing with a non-collision maritime case. *Halcyon Lines v. Haenn Ship Corp.*, 342 U.S. 282, also dealt with a non-collision maritime situation. Both cases were prior to *U.S. v. Reliable Transfer Co., supra*, which states:

> "We hold that when two or more parties having contributed by their fault to cause property damage in a maritime collision or stranding, liability for such damage is to be allocated among the parties proportionately to the to the comparative degree of their fault and that

liability for such damages is to be allocated equally only when the parties are equally at fault or when it is not possible fairly to measure the comparative degree of their fault."

In the instant case we are not dealing with a non-collision maritime situation. I think the language in *Reliable* is perfectly plain. This is a maritime collision case. The Court has found the proportionate fault of each and this is the extent of their liability.

I am of the opinion the doctrine of contribution among joint tort feasors does not apply in a maritime collision case. I think it is an exception from that doctrine. I can find no case that specifically says this, but all the maritime cases I have found that apply the doctrine are non-collision cases. *See* footnote 5 in *Cooper, supra*, page 111.

10. Collier, in its motion, contends that the collateral source rule applies as between Collier and Dillingham and that Collier is entitled to its full loss against Dillingham, even though it has collected a million dollars from its insurance carrier. The Court recognizes the collateral source rule, but the fallacy of Collier's contention is the fact that its recovery against Dillingham is limited. Collier agreed to insure the barge for full value. Had Collier done this, it would have collected the full value of the barge from the insurance company and the insurance company would have subrogated, had it not waived its subrogation rights. Collier breached its contract with Dillingham in that it did not insure the barge for full value, as the policy had a million dollar deductible feature. Collier's breach of its contract with Dillingham certainly prevents it from a windfall recovery against Dillingham.[1]

---

[1]Sessions v. Hopke, et al, 479 F.2d 1041 (1973).

11. Dillingham argues that there is no joint tort feasor relationship between themselves, Collier and Salvage. With this I do not agree. I think *Reliable Transfer* clearly has in mind joint tort feasors. But in a maritime collision or stranding, or a situation such as exists in this case, liability for damage is to be allocated among the parties proportionately to the comparative degree of their fault. This, the Court has done.

12. The Court's Findings of Fact and Conclusions of Law is AMENDED in accordance herewith and in all other respects remains in full force and effect. The Judgment of February 26, 1981, remains in full force and effect, but is AMENDED to become effective as of the date of the filing of this Supplemental Findings of Fact and Conclusions of Law.

DONE this 11th day of September 1981.

/s/ Daniel H. Thomas
United States District Judge

## EXHIBIT 6.

### Towage Agreement.

THIS AGREEMENT, made and entered into this 17th day of January, 1977 between HAWAII TUG & BARGE CO., LTD., a Hawaiian corporation, and an affiliate of Dillingham Corporation, a Hawaiian corporation (hereinafter called "H.T. & B."), and COLLIER CARBON AND CHEMICAL CORPORATION of Los Angeles, California, a California corporation (hereinafter called "Collier"), as follows:

*WITNESSETH*

1. H.T. & B. agrees to furnish a tug with all equipment necessary to tow the anhydrous ammonia barge COLUMBIA (herein called "Barge") from Galveston, Texas, to a berth designated by Collier at Swan Island, Portland, Oregon. H.T. & B. shall use due diligence to provide a seaworthy tug and to properly outfit and man the same, and the tug and Barge on commencement of the towage service shall be in condition satisfactory to surveyors approved by Collier underwriters insuring the venture and to permit Collier to obtain a certificate of the surveyors, in form satisfactory to said underwriters, as to the seaworthiness of the Barge, the towing tug and the towage operation. Collier shall at its own cost and expense prepare the Barge for towing, including the installation of navigational lights and all towing equipment to which the tug's towing line is to be attached, and shall provide an insurance wire as required by the surveyors. The towage service shall commence on or about January 20, 1977. H.T. & B. shall use due diligence to complete the performance thereof as promptly as possible and it is further provided that H.T. & B. shall have due regard to the recommendation of The Salvage Association, surveyor approving the tow.

2. H.T. & B. shall be paid $125,000.00 for the towage service, which sum shall be deemed earned by H.T. & B. upon commencement of the towage service even though at any stage of the venture thereafter the Barge or tug be lost or become unfit to continue to destination, provided that in the event the tug alone shall become lost or disabled, no such payment shall be deemed earned unless H.T. & B. shall furnish such additional tugs and equipment as may be necessary, without additional cost to Collier to complete the towage service; provided further, however, if H.T. & B. does not elect to so complete the towage service it shall be paid that proportion of the agreed lump sum payment for the towage service as the mileage of towage service accomplished toward destination, prior to the tug becoming lost or disabled, bears to the total mileage between the ports of Galveston and Portland. Payment to H.T. & B. of any proportionate charge shall be made when determined by H.T. & B.; payment of the lump sum charge shall be made upon completion of the towage service or upon the Barge becoming lost or unfit to continue to destination. The lump sum payment stated herein is predicated upon the Barge being tendered and ready for towing on or about January 20, 1977.

3. If the tug, during the course of the towage service, puts into port because the Master of the tug considers that repairs or alterations to, or additional equipment for the Barge is required, to permit the Barge to be towed to destination, or because of any other reason for which the Barge is responsible, Collier shall, in addition to bearing the cost of such repairs, alterations, or additional equipment, pay to H.T. & B. additional compensation at the rate of $4,000.00 per calendar date, and prorata for part of a day, for all time expended in such port and for all time consumed by the tug at sea in excess of the time which would have been con-

sumed had such putting in not have taken place. Such additional compensation shall not begin to run until the tug shall have actually departed from her course for the purpose of putting into such port, and any assistance that the tug may render to the Barge prior to such actual departure from her course, shall not give rise to a claim for additional compensation.

4. Neither H.T. & B. nor the tug shall be responsible for loss of or damage to the Barge or for failure to perform or complete the performance of the towage service arising from: act, neglect, or default of the master, mariner, pilot, or the servants of H.T. & B. in the navigation or in the management of the tug, tow, or towing equipment; fire, unless caused by the actual fault and privity of H.T. & B.; perils, dangers, and accidents of the sea or other navigable waters; act of God; act of war; act of public enemies; arrest or restraint of princes, rulers, or people, or seizure under legal process; quarantine restrictions; act or omission of Collier, its agent or representative; strikes or lockouts or stoppage or restraint of labor from whatever cause, whether partial or general; riots and civil commotions; saving or attempting to save life or property at sea; latent defects not discoverable by due diligence; and any other cause arising without the actual fault and privity of H.T. & B., and without the fault or negligence of the agents or servants of H.T. & B.

5. Port charges, Panama Canal fees, Custom's fees, assisting tugs, and any wharfage chargeable in connection with the towage of Collier's Barge shall be paid by Collier.

6. Collier shall indemnify, defend and hold harmless H.T. & B., its affiliates, their officers, employees, and representatives, and the tug against all claims, liabilities, loss or expense, including costs and attorney's fees, arising out of or connected with injury to or death of persons em-

ployed or being on or about the Barge and/or loss of or damage to the Barge unless such shall have been due to the sole fault of H.T. & B. Additionally, Collier shall indemnify, defend and hold harmless H.T. & B., its affiliates, their officers, employees and representatives and the tug against all claims, liabilities, fines, penalties, liens and all other loss or expense of any nature whatsoever, including costs and attorney's fees, arising out of or connected with pollution or contamination of the environment by the Barge or its contents.

7. Collier shall maintain Hull and Machinery and Protection and Indemnity insurance on the Barge to its full value in form and amount satisfactory to H.T. & B., and such policies shall be endorsed with waiver of subrogation against H.T. & B. and the tug and shall name H.T. & B. as an additional assured with loss payable to Collier. Collier shall look solely to its Hull and Machinery insurance for recovery of any loss or damage to the Barge and solely to its Protection and Indemnity insurance for wreck removal expenses.

8. This shall not be deemed to be a personal contract of a kind which would preclude H.T. & B. from obtaining the benefit of limitation of liability granted to vessel owners by the Statutes of the United States and nothing herein contained shall be deemed a waiver thereof.

9. Notwithstanding any other provision herein to the contrary, Collier shall have no responsibility with respect to and H.T. & B. will indemnify, defend and hold Collier harmless from any and all claims, liabilities, loss or expense, including costs and attorney's fees, arising out of or connected with injury to or death of the officers and crew of the tug, and/or loss of or damage to the tug, unless such shall have been due to the sole fault of Collier.

10. Any deviation by the tug, with or without the tow, in saving or attempting to save life or property at sea, or any reasonable or customary deviation, including for fuel, repairs, supplies, and other necessaries, or to land a disabled seaman, shall not be deemed to be a breach of this agreement by H.T. & B. and neither H.T. & B. nor the tug shall be liable for any loss or damage resulting therefrom.

IN WITNESS WHEREOF, the parties hereto have executed this agreement as of the day and year first above written.

HAWAII TUG & BARGE CO., LTD.
An Affiliate of Dillingham
/s/ Thomas D. Opatz
Thomas D. Opatz,
President

/s/ .....
Witness

COLLIER CARBON AND CHEMICAL CORPORATION
/s/ K. L. Openshaw
K. L. Openshaw,
Vice President

/s/ Charles A. Dow
Witness 1/14/77

## EXHIBIT 7.

### Memorandum Report and Order.

United States District Court, Northern District of California.

Dillingham Tug & Barge Corporation, a corporation, Plaintiff, v. Collier Carbon & Chemical Corporation, a corporation, Defendant, C-77-1654 WAI.

Filed: November 22, 1977.

MEMORANDUM REPORT

This matter was heard September 23, 1977 and submitted September 30, 1977 pursuant to the general Order of Reference made February 21, 1977 by The Honorable William A. Ingram on plaintiff's motion to dismiss defendant's counterclaim. Plaintiff appeared by John R. Pascoe, Esq. and defendant by Neal E. Schmale, Esq. and the court, having heard the argument of counsel and having considered the moving papers and record, hereby DENIES plaintiff's motion.

Plaintiff entered a contract with defendant pursuant to which plaintiff was to tow defendant's barge from a Texas port through the Panama Canal to an Oregon port. Near Acapulco, Mexico the barge sunk while under plaintiff's tow. Defendant having failed to pay, plaintiff filed this suit for towing fees and defendant counterclaimed for loss of the barge on three theories: (1) breach of contract, (2) negligent towage, and (3) gross negligence and willful misconduct. This motion followed in which plaintiff seeks dismissal of defendant's counterclaim on the theory that, since the contract contains a clause requiring defendant to look solely to its insurance carrier for damages for loss of the barge, and exculpating plaintiff from any liability for negligence, defendant has no counterclaim against plaintiff.

In *Bisso v. Inland Waterway Corporation*, 349 U.S. 85 (1955), the Supreme Court concluded a provision releasing the towing vessel from all liability for its negligence is invalid and contrary to public policy established by judicial rule. In *Kincaid v. Trans-Pacific Towing*, 367 F.2d 857, 858 (9th Cir. 1966), our Court of Appeals notes the *Bisso* doctrine and the fact that it has been consistently followed in this circuit.

One might suppose that these cases would put an end to the controversy at hand and to plaintiff's motion. Plaintiff, however, argues that the 5th Circuit in *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974), cert. denied, 419 U.S. 836 (1974), grafted onto the public policy declared by the Supreme Court approval of a contract provision requiring the purchase of insurance to cover the negligence of master and crew. Since, says plaintiff, the theory of defendant's counterclaim is that plaintiff violated a provision of the contract by towing at a speed in excess of eight knots, thereby causing the loss of the barge, defendant has no claim against plaintiff because of the exculpatory clause, only against the insurance provided for by the contract.

This defense does not take into account that it can be inferred from the theory of the counterclaim that willful misconduct took place. Be that as it may, in *Twenty Grand* while affirming the provision in a contract requiring the purchase of insurance, the Court noted at Page 683 that the towing agreement "neither by indirection nor otherwise relieves the tug owner or the towboat of its liability to the barge owner as the result of the towboat's negligence. The barge owner could have sued the tug owner if the insurance underwriters had, for whatever reason, failed to pay. Indeed, it is admitted that the tug owner is liable for damages sustained as the result of the loss of use of the barge, as well

as any other losses not covered under the policy."

The contract in this action goes further and exculpates the plaintiff of liability in addition to requiring the purchase of insurance. In so doing it violates the public policy declared not only by the Supreme Court but the 5th Circuit as well. The validity of the provision in the parties' contract requiring the purchase of insurance is not really before the Court on plaintiff's motion to dismiss. It is rather the provision exculpating plaintiff from liability which is before the Court and plaintiff's motion must fail.

How the relative rights of the parties are to be satisfied if insurance was in fact purchased (or not purchased) pursuant to the contract is a matter the parties should address, by amendment of pleadings if necessary, to the end that all outstanding issues be resolved in this action.

The foregoing Memorandum Report and the Order that follows shall constitute the Court's findings of fact, conclusions of law, and recommendations in conformity with 28 U.S.C. 636 (b) (1) (B).

ORDER

IT IS ORDERED:

That plaintiff's motion to dismiss defendant's counterclaim is DENIED.

DATED: 21 November 1977

/s/ Thomas H. Rothwell
THOMAS H. ROTHWELL
UNITED STATES MAGISTRATE

/s/ Copies To All Counsel 11/22/77

Office - Supreme Court, U.S.
FILED
JAN 10 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-945

# In the Supreme Court

OF THE

# United States

OCTOBER TERM, 1983

UNION OIL COMPANY OF CALIFORNIA,
*Petitioner,*

vs.

DILLINGHAM TUG & BARGE CORPORATION,
NICKUM & SPAULDING ASSOCIATES, INC.,
and
THE SALVAGE ASSOCIATION,
*Respondents.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN R. PASCOE

HANCOCK, ROTHERT & BUNSHOFT
FORREST BOOTH
Four Embarcadero Center
Suite 1000
San Francisco, CA 94111
Telephone: (415) 981-5550
*Attorneys for Dillingham Tug & Barge Corporation*

BOWNE OF SAN FRANCISCO, INC. • 190 NINTH ST. • S.F., CA 94103 • (415) 864-2300

## QUESTION PRESENTED FOR REVIEW

Was the Ninth Circuit correct in its two unanimous decisions holding enforceable the contract between Dillingham and Union and denying Union's request to void the contract on public policy grounds?

## THE PARTIES

The parties to this action are Dillingham Tug & Barge Corporation ("Dillingham"), Union Oil Company of California ("Union"), Petitioner herein, Nickum & Spaulding Associates, Inc. ("Nickum & Spaulding"), and The Salvage Association.

Collier Carbon & Chemical Corporation, originally the defendant and later an appellee herein, was apparently merged into Petitioner Union during the course of this litigation. Third-Party Defendant Todd Shipyards Corporation ("Todd") settled with Petitioner Union prior to trial.

## LISTING OF PARENT, SUBSIDIARY AND AFFILIATED COMPANIES

Dillingham Corporation, the parent company of Dillingham Tug & Barge Corporation, is a privately held company. In addition to wholly-owned subsidiaries, Dillingham Corporation owns an interest in the following companies:

Conoco-Dillingham Oil Company
Dillingham Corporation of Micronesia
Dillingham Industries Limited
Electrix Limited

No such interest is held by Dillingham Tug & Barge Corporation, however.

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### I

### OFFICIAL AND UNOFFICIAL REPORTS

The opinion of the Honorable Daniel Holcombe Thomas, Senior District Judge of the United States District Court for the Southern District of Alabama, sitting by designation in the United States District Court for the Northern District of California, is reported at 548 F.Supp. 691 (N.D. Cal. 1981).[1] The decision of the Court of Appeals is reported at 707 F.2d 1086 (9th Cir. 1983).

[1]Union is apparently unaware of the report of the District Court's decision. Union's Petition for Certiorari, p. 1, neglects to cite it.

## II

## BASIS FOR SUPREME COURT JURISDICTION

Petitioner Union is seeking review of a decision of the United States Court of Appeals for the Ninth Circuit. That decision, with the addition of certain typographical errors, is set forth as Exhibit 1 in the Appendix to Union's Petition for Certiorari, and is reported as noted *supra* p. 1. The official decision is incorporated herein by reference.

This unanimous decision of the U.S. Court of Appeals for the Ninth Circuit was handed down June 10, 1983. Union filed a Petition for Rehearing in the Court of Appeals, which was summarily denied by a unanimous panel without opinion on September 6, 1983. Union filed its Petition for Certiorari in this Court on December 5, 1983. Counsel for Dillingham received copies of Union's Petition by United States mail on December 8, 1983.

Should it accept this case for review, this Court would have jurisdiction pursuant to 28 U.S.C. § 2101(c), as reflected in Rules 20.2 and 20.4 of this Court. The District Court had jurisdiction of this case in admiralty pursuant to 28 U.S.C. § 1333(1).

## III

## CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Union's Petition for Certiorari does not involve any federal questions, Constitutional provisions or treaties. Should this case be accepted for review, this Court's decision will require interpretation of the International Voyage Loan Line Act of 1973, in particular 46 U.S.C. § 86b, and of 46 U.S.C. § 395, which requires inspection by the United States Coast Guard of barges which make ocean voyages. Interpretation of the relevant regulations issued pursuant to those statutes will also be required.

## IV
## STATEMENT OF THE CASE

### A. Statement of Facts

The facts upon which this action is based are agreed to in large part by the parties. Union signed a contract[2] with Dillingham on January 17, 1977, after extensive negotiation between representatives of the two companies.[3] The contract provided that Dillingham would tow Union's inland river barge in the open ocean from Galveston, Texas to Portland, Oregon, by way of Panama. Because of the nature of this tow, the manuscript agreement was specially prepared to apply to this transaction,[4] but was based upon a previous contract between the same two parties. Union had investigated various other manners of transporting the barge, but chose an in-the-water tow without building a cover over the barge's open hopper because this was the cheapest of various alternatives.[5] Union negotiated with several towboat companies, and selected Dillingham because it submitted the lowest bid. The contract provided, *inter alia*, that Union would procure hull and machinery insurance on the barge to its full value, in form and amount

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[2]The Towage Agreement between Union and Dillingham (Dillingham's subsidiary involved herein was formerly known as Hawaii Tug & Barge Co., Ltd.) (hereinafter the "contract") is set forth, with certain typographical errors, as Exhibit 6 in the Appendix to Union's Petition for Certiorari. The contract is incorporated herein by reference.

[3]*See* Exhibits 1 through 9, which are telexes constituting negotiation and finalization of various terms of the contract. These telexes span the period from December 17, 1976 through January 28, 1977. *See also* Exhibit 10, a letter from Union to Dillingham enclosing the first draft of the contract, prepared by Union.

[4]*See* Exhibit 10, the letter which transmitted the first draft of the contract from Union to Dillingham.

[5]548 F.Supp. at 693-4.

satisfactory to Dillingham, and Union would look only to this insurance in the event of loss of or damage to the tow.[6]

The Salvage Association approved the barge for tow, on behalf of Union's underwriters. The barge was prepared for tow by Todd, pursuant to specifications prepared by Nickum & Spaulding.[7] These included the addition of thin sheetmetal straps over the cargo tanks, which it was hoped would hold the tanks in the open hopper of the barge when water accumulated therein; water in the hopper would tend to sink the barge and cause the empty tanks to float out.[8]

The barge was safely towed by Dillingham for four weeks, through the Gulf of Mexico and the Panama Canal. However, off Baja California, the tow encountered its first rough weather. The barge broke up on February 25th, 1977, while the tug was attempting to tow it to shore.[9]

Following the loss of the Barge *Columbia*, Union purchased a replacement barge of exactly the same type and design as the *Columbia*. Realizing that an in-the-water ocean tow of an inland river barge presented an unreasonable risk of loss, Union this time contracted with and paid Dillingham to load the replacement barge on the deck of a larger, oceangoing barge, which transported the replacement barge to Portland without incident.[10]

**B. Proceedings in the Courts Below**

Since its inception, this case has involved primarily the enforceability of the provisions of the contract between Union and Dillingham. This is the principal issue upon

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[6]Contract, *supra* note 2, Paragraph 7.

[7]548 F.Supp. at 693-4.

[8]548 F.Supp. at 694.

[9]707 F.2d at 1089.

[10]548 F.Supp. at 697.

which Union now bases its Petition for Certiorari. Union asserts that the agreement the parties made that Union would insure its barge for the benefit of both Union and Dillingham, is an exculpatory provision which is void on grounds of public policy. This issue has been fully, if not exhaustively briefed throughout this litigation, and has been directly ruled on twice by the District Court and twice by the Court of Appeals.

On September 1, 1977, Dillingham filed in the District Court a Motion to Dismiss [Union's] Counterclaims. In its response, Union argued that the insurance requirement provisions of the contract are exculpatory clauses, prohibited on public policy grounds by *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) [hereinafter cited as *Bisso.*].

In ruling on Dillingham's motion, United States Magistrate Thomas H. Rothwell held that "The validity of the provision in the parties' contract requiring the purchase of insurance is not really before the Court on plaintiff's motion to dismiss."[11] The Court therefore made no ruling on the insurance requirement issue, having assumed the motion was based on other provisions of the towage agreement, and the motion was denied on other grounds.

The insurance requirement issue was thoroughly briefed by the parties in advance of trial. Union and Dillingham each filed a trial brief of approximately 30 pages. In addition, the issue was fully set forth in the Joint Pretrial Statement, which was filed with the Court on March 18, 1980.

This case was tried in September and October of 1980 in the United States District Court for the Northern District of California before Senior District Judge the Honor-

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[11]Memorandum Report and Order, set forth as Exhibit 7 in the Appendix to Union's Petition for Certiorari.

able Daniel Holcombe Thomas of the United States District Court for the Southern District of Alabama, sitting by designation. At the close of trial, both Dillingham and Union submitted Proposed Findings of Fact and Conclusions of Law. These pleadings restated the parties' positions on the insurance requirement issue. Three weeks later, Union filed an unsolicited second set of Proposed Findings of Fact and Conclusions of Law which was 89 pages in length, plus a Supplemental Trial Brief, both of which further discussed the insurance requirement issue. Dillingham also filed a Post-Trial Brief, which did not directly address the insurance requirement issue.

On March 2, 1981, judgment was entered in favor of Union. The District Court held that Union breached its contract with Dillingham by self-insuring the barge for the first $1,000,000 of its value, instead of fully insuring it as the contract required. Therefore it held Union could recover none of the first $1 million of the barge's value. The court then found that Union had received $1,000,000 from its insurance underwriters, who had waived subrogation against the tower and therefore could not recover from Dillingham. Nonetheless, the Court allowed Union to recover from Dillingham, the Salvage Association and Nickum & Spaulding for that portion of the barge's value for which Union had been paid by its underwriters.[12] However, Dillingham prevailed on the issue of and the Court upheld the validity of the insurance requirement provisions, and refused Union's request to strike them down as contrary to the *Bisso* doctrine.[13]

On March 12, 1981, Dillingham filed a Motion to Alter or Amend Judgment, requesting that the court reconcile

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[12]548 F.Supp. at 698, 700.

[13]548 F. Supp. at 698.

various inconsistencies in its original decision. Dillingham again briefed a portion of the insurance requirement issue, and Union presented in its opposition the same arguments contained in its Petition for Certiorari herein, that the contract is unenforceable on public policy grounds. On September 17, 1981, the Court filed its Supplemental Findings of Fact and Conclusions of Law, which are reported at 548 F.Supp. 700-703. This supplemental decision did not change the outcome of the case, and the Court reiterated its belief that Union could recover for the portion of the value of the barge for which its underwriters had reimbursed it. Dillingham filed the first Notice of Appeal in this matter on September 21, 1981. The remaining parties later filed notices of appeal also.

In the United States Court of Appeals for the Ninth Circuit, Dillingham filed its Brief of Appellants, Answering Brief of Appellants and Reply Brief of Appellants, pursuant to the Court's briefing schedule. On April 19, 1982, Union filed its Appellant's Opening Brief against The Salvage Association and Nickum & Spaulding. On August 2, 1982, Union filed its Appellant's Opening Brief Against Dillingham Tug & Barge Corporation. Because this brief was 47 pages in length, the United States Court of Appeals for the Ninth Circuit ordered it stricken and ordered Union to file a brief not to exceed 35 pages. On August 26, 1982, Union filed its Appellant's Opening Brief Against Dillingham Tug & Barge Corporation, which was 34 pages in length. Union later filed Appellants' Consolidated Answering Brief Against The Salvage Association and Nickum & Spaulding Associates, Inc., and Appellants' Consolidated Answering Brief Against Dillingham Tug & Barge Corporation. The insurance requirement issue was fully briefed by both Union and Dillingham *passim*.

The decision of the United States Court of Appeals for the Ninth Circuit of June 10, 1983, reversed the judgment

against Dillingham in its entirety. Union was prohibited from recovering a second time for that portion of the value of the barge for which it already had been paid by its underwriters. The Court then affirmed that the contract provisions requiring Union to insure the barge to its full value and to look only to said insurance in the event of loss were fully enforceable, were not forced on Union as a result of overreaching, and were not waived by Dillingham. The Court went on to hold specifically that, as Dillingham had argued, the contract provisions were not exculpatory clauses void on grounds of public policy, as Union urges herein. The Court based its decision on a long line of cases decided by the Court of Appeals for the Fifth Circuit, which will be discussed *infra* p. 13. Finally, the collateral source rule was held not to apply because the insurance proceeds received were not from a source independent of Dillingham, since the contract with Dillingham required Union to procure said insurance. The Court affirmed that Union had self-insured for the amount of the $1,000,000 deductible applicable to its policy, and therefore Union could not collect that amount from Dillingham either.

Union filed its Petition for Rehearing in the Court of Appeals on June 27, 1983. It was summarily denied without opinion by a unanimous panel on September 6, 1983.

## V

## ARGUMENT

### A. Aside From Certain Factual Contentions by Union, the Sole Question Before This Court Is the Enforceability of the Towage Contract

#### 1. Union Nowhere Asserts that Its Request for Review Concerns Anyone Other Than the Named Parties

Notably absent from Union's Petition for Certiorari is any assertion that the instant case, should this Court accept

it for review, or any of the issues presented therein, are of the slightest concern to any person or entity other than the four parties whose names appear in the caption of the case. Union makes no claim that any of the issues addressed herein rise to a level deserving of this Court's attention. The one legal issue, the enforceability of a contractual requirement to procure insurance, is of relatively narrow import and is unlikely to affect many parties or transactions, and Union's request that this Court overturn certain factual findings of the trial court which were affirmed by the Court of Appeals, is trivial at best. Therefore on its face, Union's Petition for Certiorari should be denied.

### 2. The Court of Appeals Properly Enforced the Provisions of the Contract, and There Is No Reason for Review in This Court

The contract of towage between Dillingham and Union is reprinted as Exhibit 6 in the Appendix of Union's Petition for Certiorari. For the sake of brevity, Dillingham will not cause the contract to be reprinted here, but will incorporate it by reference. As noted *supra* note 4, Union initially proposed, drafted and sent to Dillingham the form of the contract which, with modifications, ultimately was signed by the parties.[14] The parties thereafter exchanged eight (8) telexes[15] and made numerous telephone calls during which modifications to the draft agreement were discussed, and when the contract was agreeable to both parties, it was executed on January 17, 1977.[16] It is worthy of note that, prior to execution of the contract, the draft agreement was carefully reviewed by Union's legal depart-

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[14]*See* Exhibit 10, the letter which transmitted the draft agreement from Union's Project Manager to Dillingham's Marketing Manager.

[15]*See* Exhibits 2 through 9, inclusive.

[16]Contract, *supra* note 2.

ment, which expressed no reservations whatever concerning the terms contained therein.[17]

At the outset, Union's Petition for Certiorari attempts to mislead this Court by restating the extraneous argument that the entire towage contract should be voided because Paragraph 4 thereof may be unenforceable as contrary to public policy.[18] Union asserts that: "Clause Four of the

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[17]Charles A. Dow, Union's Manager of Project Engineering, testified at trial that he read the draft contract before it was signed, and that he was fully aware of the provision therein that Dillingham was to be named an additional assured with waiver of subrogation under Union's hull and machinery policy.

"Mr. Booth:

Q. . . . what did you do with a copy of those provisions? Did you refer them to anyone for review?

A. Yes.

Q. Who did you send it to?

A. First reviewed it with my boss, Overshaw, and then in turn sent it to our insurance or Mr. McCullough [Union's Manager of Insurance].

Q. You also sent a copy of it for review to your legal department, didn't you?

A. Yes.

Q. Now . . . you sent a reply back to Mr. Jonsson [Dillingham's Marketing Manager] saying that Collier [Union] accepted all those modifications to the contract?

A. If you have a letter saying so, yes.

Q. Well, let me show you [Exhibit 3 hereto], a telex of the 6th of January, from yourself to Mr. Jonsson. I will ask you if that's the import of that telex.

A. Yes."

Testimony of Dow, Record at 1502-1503.

[18]Dillingham submits that Paragraph 4 of the contract is not void as contrary to public policy pursuant to *Bisso, supra,* because Paragraph 4 provides that Dillingham shall not be liable for loss of or damage to the barge ". . . unless caused by the actual fault and privity of [Dillingham] . . ." In other words, the parties contractually agreed that Dillingham would not be responsible for loss of or damage to the barge caused by the acts or omissions of Union or of third parties. In any case, Paragraph 4 has never been an issue in this litigation.

towage agreement purported to exculpate Dillingham for any loss or damage to the [sic] resulting from the acts or negligence of Dillingham."[19] (footnote omitted). Dillingham has stated from the beginning that it places no reliance in this litigation on Paragraph 4 of the towage agreement. While this repetition should not be necessary, Dillingham restates now for the third time that it places no reliance herein on the provisions of Paragraph 4, since Union apparently refuses to accept Dillingham's waiver of this argument.[20]

This litigation actually concerns the provisions of Paragraph 7 of the contract, Union's knowing and willful breach of Paragraph 7's provisions, and their enforceability following arms'-length bargaining between sophisticated corporations seeking to allocate the cost of insurance as one element of an agreement reached between them. Union has been attempting unsuccessfully for seven years to have the insurance requirement provisions of the towage contract struck down by a court of law as exculpatory clauses contrary to public policy. So far, Union has not succeeded once.

In Paragraph 7 of the contract, Union and its underwriters agreed to six provisions. As required, Union and its underwriters procured minimal, although not satisfac-

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[19]Petition for Certiorari, p. 7.

[20]In its Answering Brief of Appellants, filed in the Court of Appeals on October 12, 1982, Dillingham stated:

> "At three places in its opening brief, Union has referred to and cited portions of Paragraph 4 of the towage agreement between Union and Dillingham. Union asserts that this paragraph and its provisions are void as against public policy pursuant to *Bisso v. Inland Waterways Corp.* Dillingham has placed no reliance on this provision of the towage agreement throughout the course of this litigation, but for the sake of clarity, Dillingham re-states that it does not rely thereon in this appeal." (footnotes omitted).

tory, hull and machinery insurance on the barge; Union's underwriters waived subrogation against Dillingham; and Dillingham was named an additional assured[21] under the hull policy, but with loss payable to Union.[22] Union breached Paragraph 7 of the contract,[23] in that it did not procure *full value* hull insurance, but only insured half of the barge's value,[24] and the hull insurance was not satisfactory in form and amount to Dillingham; in fact, its terms were never presented to Dillingham for review. Finally, Union obviously has refused to look only to its hull and machinery insurance for recovery of the subject loss.

The Ninth Circuit held, and Dillingham believes, that it is obvious that insurance is a fact of life in modern business, and insurance arrangements such as the one at issue herein are common in many types of commercial agreements.[25] Both parties to the contract knew it would be procured, and it was only a question of who would pay

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[21]"Assured" is an insurance industry variation of the word "insured".

[22]*See* Exhibit 9, wherein Union confirmed that its underwriters had waived subrogation against Dillingham, and had named Dillingham an additional insured under the hull and machinery policy.

[23]The District Court so held at 548 F.Supp. 703. The Court of Appeals affirmed this finding at 707 F.2d 1091.

[24]707 F.2d at 1091.

[25]*See Ogea v. Loffland Bros. Co.*, 622 F.2d 186 (5th Cir. 1980) (contract between drilling platform owner and operator which required the operator to procure insurance naming the owner as a co-insured with waiver of subrogation); *Aetna Casualty and Surety Co. v. L.K. Comstock & Co.*, 488 F.Supp. 732 (D.Nev. 1980) (agreement between owner and prime contractor for construction of oil storage tank, wherein contractor was obligated to procure insurance with owner as named insured); *Price v. Zim Israel Navigation Co., Ltd.*, 616 F.2d 422 (9th Cir. 1980) (contract between stevedoring contractor and steamship company providing that steamship company would be named a co-insured under stevedore's liability insurance policies).

for it. This case falls squarely under the Fifth Circuit line of decisions which begins with *Fluor Western, Inc. v. G&H Offshore Towing Co., Inc.*, 447 F.2d 35 (5th Cir. 1971), *cert. denied*, 405 U.S. 922 (1971) [hereinafter cited as *Fluor Western*] and *Twenty Grand Offshore, Inc. v. West India Carriers, Inc.*, 492 F.2d 679 (5th Cir. 1974), *cert. denied*, 419 U.S. 836 (1974) [hereinafter cited as *Twenty Grand Offshore*].

In *Fluor Western*, the Court held that ". . . contracting parties should be free to distribute liabilities and costs as they wish."[26] The Court in that case noted that a provision almost identical to the one at issue between Dillingham and Union actually waived no rights in and of itself. There the cargo insurance underwriters waived their rights to subrogation only by a later and independent agreement.[27] This likewise occurred in the present case when Union's underwriters, at the request of Union and pursuant to Union's obligations under the contract, waived their rights of subrogation against Dillingham.[28] The Court in *Fluor Western* further held that:

> ". . . public policy . . . [does not require] that any particular party should necessarily bear the cost of such insurance, particularly when the party that does bear the cost [Union] had an insurable interest . . . and is to be the named insured, as is the case with the plaintiff in this suit."[29]

Dillingham submits that *Twenty Grand Offshore, supra,* is even more closely on point, since it involved the loss of a barge and suit by the barge owner against a tug. As in the instant case, the barge owner breached the contract and failed to make the agreed insurance arrangements.

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[26] 447 F.2d at 38.

[27] 447 F.2d at 39-40.

[28] *See* Exhibit 9.

[29] 447 F.2d at 40.

The Court found the reasoning in *Fluor Western* compelling, particularly because:

> ". . . [I]f the barge *complies* with its contractual obligation to effect a waiver of subrogation it may not sue the tower, but if the barge *breaches* its contractual obligation to effect a waiver of subrogation it is free to pursue the tower."[30]

The insurance provisions at issue are neither onerous nor unusual, as *Fluor Western* and *Twenty Grand Offshore* indicate. The barge was to be insured to its full value and Dillingham was to be named an additional insured, but with loss payable to Union. Having received a lower price for the towage services rendered by Dillingham, and various other considerations which will be discussed *infra*, Union in exchange contracted to look solely to the joint policy of hull and machinery insurance if the barge were damaged or lost. As the Ninth Circuit noted, the parties were effectively insuring themselves under one insurance policy instead of two. Obvious cost savings resulted.[31]

Union would have this Court believe that Union's agreement to an allegedly one-sided series of requirements was coerced by Dillingham, and then said provisions were unilaterally enforced by the Ninth Circuit's decision. This is untrue. Indeed, the towage contract provided far more duties and obligations to Dillingham than to Union. The contract provided in Paragraph 9 that Dillingham:

> ". . . will indemnify, defend and hold [Union] harmless from any and all claims, liabilities, loss or expense, including costs and attorney's fees, arising out of or connected with injury to or death of the officers and crew of the tug, and/or loss of or damage to the tug . . ."[32]

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[30] 492 F.2d at 685.

[31] 707 F.2d at 1090.

[32] *See* Exhibit 6 to the Appendix to Union's Petition for Certiorari.

In addition, as an addendum to the agreement, Union telexed that ". . . [Dillingham] must obtain its own towers [sic] liability [insurance]."[33] Dillingham confirmed by return telex that it carried such tower's liability coverage.[34] Finally, Paragraph 1 of the contract provided that Dillingham would use due diligence to provide a seaworthy tug, to properly outfit and man it, and to take all steps necessary at the commencement of the tow to satisfy surveyors appointed by Union.[35] Union's Petition for Certiorari neglects to inform this Court that the towage contract represented the results of give and take on both sides, and was the product of arms'-length negotiation between Dillingham and Union which spanned a period of almost six weeks.[36]

The District Court held[37] that there was no overreaching of Union by Dillingham. The Ninth Circuit specifically affirmed this finding,[38] noting that ". . . Union failed to meet their burden of establishing the existence of overreaching."[39] Although in the contract involved in *Twenty Grand Offshore* there were mutual insurance requirements, the Ninth Circuit herein held that mutuality is not required for the enforcement of an insurance requirement provision.[40] (The Court of Appeals apparently disregarded

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[33]*See* Exhibit 7.

[34]*See* Exhibit 8.

[35]Contract, *supra* note 2.

[36]*See* Exhibits 1-9. Exhibit 1 is a telex dated December 17, 1976, and it outlines the general parameters of the agreement between Union and Dillingham. Exhibit 9, constituting confirmation that certain contract requirements had been satisfied, is a telex dated January 28, 1977.

[37]548 F.Supp. at 698.

[38]707 F.2d at 1090.

[39]*Id.*

[40]*Id.*, citing *BASF Wyandotte Corp. v. Tug LEANDER, JR.*, 590 F.2d 96 (5th Cir. 1979).

the fact that Dillingham was required herein by Union to procure insurance as well.)

Union's attempt to overturn the contract, predicated as it is upon a misinterpretation of what is required by public policy, simply defies logic. To assert that a tugboat company was guilty of overreaching Union, the 28th largest industrial corporation in the United States, with annual sales of $10.4 billion,[41] when the towage agreement was specifically approved without protest by both Union's insurance and legal departments[42] prior to its execution, is not credible.

### 3. Public Policy Considerations

Union asserts that the insurance provisions in the contract are unenforceable, based upon the public policy considerations enunciated by this Court in *Bisso, supra.*

> "Union submits that this insurance provision effectively precludes any liability of Dillingham for loss of the *Columbia* and is therefore just as void and enforceable [sic] as a direct attempt at exculpation."[43]

*Bisso* concerned a provision in a towing contract that the towage would be at the "sole risk" of the barge and that the master and crew of the tug would be deemed the servants of the barge.[44] Both provisions were designed to prevent the barge owner from making any recovery whatever in the event of loss. This Court held the tug company could not contract out of responsibility for its own negligence in this manner for two reasons: (1) to discourage negligence by making wrongdoers pay damages, and (2) to protect those in need of goods or services from being

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[41]The 500 Largest U.S. Industrial Corporations, *Fortune,* May 2, 1983, at 228.

[42]Testimony of Dow, *supra* note 17.

[43]Petition for Certiorari, p. 8. Dillingham assumes Union meant to say "unenforceable".

[44]349 U.S. at 86.

overreached by those who have the power to drive a hard bargain.[45]

*Bisso* is not a popular decision, and it has been widely criticized. The strong dissent to the decision by Mr. Justice Frankfurter, in which he was joined by Justices Reed and Burton, points out the inherent weakness in the *Bisso* logic:

> The argument is made that permitting the parties to grant immunity to the tug will stimulate irresponsibility, or, at least, that it is necessary to force the tug to bear losses resulting from its negligence in order to provide an incentive to reasonable care. In the commercial setting of the towage industry this argument has little force, unless we are prepared also to forbid the tug to insure against such losses or liabilities. If not, then the question ultimately is whether public policy requires that the tug, rather than the tow, shall bear the cost of insurance. . . In the absence of anything in the record, or any facts of which this Court may take judicial notice, that the tug has exploited an unfair bargaining position, there is no reason why the parties should not be free to distribute this cost as they see fit.[46]

Moreover, Mr. Justice Harlan noted in a concurring opinion in 1963 to the decision in *Dixilyn Drilling Corp. v. Crescent Towing and Salvage Co.*, 372 U.S. 697 (1963), a case relied upon heavily by Union herein, that ". . . I would prefer to see *Bisso* reconsidered, believing, with deference, that it was wrongly decided. . ."[47] Dillingham submits that in 1984 these and other criticisms of the *Bisso* rationale[48] are more compelling than the majority decision in that case. There

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[45]349 U.S. at 91.

[46]349 U.S. at 118-119.

[47]372 U.S. at 698.

[48]Feingerts, B.L. and Stein, M.S., *Exculpatory Provisions in Towage Contracts*, 49 Tul.L.Rev. 392 (1975).

are strong public policy considerations in favor of such insurance requirement provisions, as the Ninth Circuit noted herein at 707 F.2d 1089, and the Court of Appeals' decision was correct in enforcing the terms of the towage contract to which Union freely agreed.

### 4. The Insurance Requirement Was Never Waived by Dillingham

Realizing that the public policy arguments it is making are unpersuasive and insufficient to overturn the contract, Union in its Petition for Certiorari also attacks the findings of fact of the District Court, which findings were affirmed by the Court of Appeals. Specifically, Union alleges in its "Statement of Facts" that "Dillingham was informed of [the $1,000,000] deductible prior to the departure of the tow from Galveston, Texas."[49] While this is Union's position, which it has argued at length, Union persuaded neither the District Court nor the Court of Appeals that the existence of a $1,000,000 policy deductible was ever conveyed to Dillingham. The trial court specifically refused to find that this information had been conveyed to Dillingham,[50] and the Ninth Circuit noted that the parties dispute whether Dillingham was ever so informed.[51] The Court of Appeals then affirmed the lower court's ruling that Dillingham in any case never waived its objection to the existence of this secret self-insurance arrangement.

Since Union argued that there was a waiver of a contract provision, it had the burden of pleading and proving facts establishing waiver.[52] Having failed to convince either court

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[49]Petition for Certiorari, p. 3.

[50]548 F.Supp. at 701.

[51]707 F.2d at 1089.

[52]Waiver is an affirmative defense, Fed.R.Civ.P. 8(c), and the burden of pleading and proving facts sufficient to establish waiver is on the party (Union) asserting the waiver occurred. *United States v. Poland*, 251 U.S. 221, 227-228 (1920).

below to make a finding in its favor, Union has failed to prove the existence of any waiver. Indeed, the Court of Appeals affirmed the trial court's ruling: " . . . Union breached its agreement to insure the barge for its full value by insuring it with a $1,000,000 deductible. . . Union therefore became a self insurer for this $1,000,000."[53] Dillingham asserts there is no basis whatever to disturb these findings and conclusions of the Court of Appeals.

### 5. There Is No Split Among the Circuits on the Insurance Provision Issue

In an attempt to persuade this Court to accept this matter for review, Union asserts that there is a split among the Courts of Appeals regarding the enforceability of insurance requirement provisions. Dillingham asserts that no such split exists. Rule 17.1(a) of this Court states that one of the special and important reasons which may persuade this Court to grant review on a writ of certiorari is a Court of Appeals decision in conflict with the decision of another Court of Appeals on the same point. It should be noted that the rule requires a *decision* by both Courts of Appeals. Mere *dictum* in a decision of one Court of Appeals which is in conflict with the decision of another Court of Appeals is an insufficient reason to grant a petition for certiorari. *See Keller v. Adams-Campbell Co.*, 264 U.S. 314 (1924), wherein the Court dismissed as improvidently granted a writ of certiorari which had previously been granted, based in part on *dictum* in the trial court's decision.

It is important that this Court:

> ". . . be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of parties, and in cases where there is a real

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[53] 707 F.2d at 1091.

> and embarrassing conflict of opinion and authority between the circuit courts of appeal." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

Indeed, a mere conflict between or among the circuits is not enough; the issue in conflict must be significant and worthy of this Court's attention. In *Freeman v. Flake*, 405 U.S. 1032 (1972) (Douglas, J., dissenting), this Court denied a petition for a writ of certiorari, despite the fact that four courts of appeals had decided the issue in question one way, and four had decided the exact opposite.

Union asserts that *PPG Industries v. Ashland Oil Co.*, 592 F.2d 138 (3d Cir. 1978), *cert. denied*, 444 U.S. 830 (1979) [hereinafter cited as *PPG Industries*] is a *decision* in conflict with *Twenty Grand Offshore* and *Fluor Western, supra*. In fact, *PPG Industries* has *dictum* which appears to conflict with those decisions; however, its decision is based upon different considerations entirely, as will be seen *infra*, and in that case there was a very different alignment of the parties than exists in the present case. Furthermore, the *PPG Industries* decision contains a strong dissent by Circuit Judge Rosenn, which states that the distinction made in *Fluor Western, Twenty Grand Offshore* and the other Fifth Circuit cases, between the requirement to procure insurance and exculpatory clauses, is valid and should be followed.[54] It is unclear what the Third Circuit would decide, if faced with the same facts and alignment of parties as existed in *Twenty Grand Offshore* or the instant case.

It should be noted that *PPG Industries* is a case to which the Carriage of Goods by Sea Act ("COGSA"), 46 U.S.C. §§ 1300-1315 applies. COGSA was incorporated by reference into the contract of affreightment at issue therein.

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[54] 592 F.2d at 153-154.

This in itself distinguishes *PPG Industries* from the instant case, in that the Court there was concerned with the duties of a common carrier and the statutory requirements and allocations of rights and duties between carriers and shippers that COGSA provides. The present case, on the other hand, involves a custom-tailored private towage agreement between sophisticated entities, not governed by any statute, and not involving common carriage.

The contract between PPG, the cargo owner, and Ashland, the tower, required the cargo owner to purchase insurance with waiver of subrogation in favor of the carrier. However, by the time PPG brought suit against Ashland, the statute of limitations under COGSA had run, and the District Court dismissed Ashland from the case. Thus the only party in a position analogous to that of Dillingham herein, and in a position to enforce the contractual requirement regarding the purchase of insurance, was not before the Court. Another tower, Canal Barge Company, with whom Ashland had contracted to perform most of Ashland's responsibilities to PPG, remained before the Court, and tried to avail itself of PPG's agreement with Ashland to procure insurance and waive subrogation. However, there was no privity of contract between PPG and Canal, and the contract between Ashland and Canal made no mention of cargo insurance. Thus the legal issue decided by the Court in *Fluor Western* and by the Ninth Circuit herein, was not before the Court and was not ruled on in *PPG Industries*. Canal never bargained with PPG about insurance, and could not show a reduction of its charges on that basis. Hence the insurance clause was held to apply to and benefit no one other than Ashland.[15] The Court's expression in *dictum* of its belief that the insurance requirement provision of the contract might be unenforceable, a point the Court was not called upon to decide, lacks persuasiveness

[15] 592 F.2d at 145.

in the instant case, given the alignment of the parties in *PPG Industries* and the absence of the party which bargained for the insurance provision in the first place. The decision in *PPG Industries* is not a decision in conflict with the decision of another Court of Appeals on the same point, as contemplated by Rule 17.1(a).

While Union has placed great reliance upon the *dictum* in this lone Third Circuit decision, it has failed to advise this Court of the dozens of decisions in several circuits which follow the reasoning of *Fluor Western* and *Twenty Grand Offshore*.[56] Not only is the clear weight of authority in support of affirming the enforceability of such insurance requirements, as the Ninth Circuit did herein; no decision holds to the contrary.

It also should be remembered that a Petition for Certiorari was denied by this Court in the *PPG Industries*

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[56]*E.g., Alamo Chemical Transportation Co. v. M/V OVERSEAS VALDES*, 469 F.Supp. 203 (E.D.La. 1979); *Allied Chemical Corp. v. Gulf Atlantic Towing Corp.*, 244 F.Supp. 2 (E.D.Va. 1964). All the Circuits in addition to the Fifth which have passed upon requirements to procure insurance have held that they are not invalidated either by *Bisso* or as contrary to public policy. The Fourth Circuit so held in *Kerr-McGee Corp. v. Law*, 479 F.2d 61, 64 (4th Cir. 1973). The District of Columbia Circuit has approved the enforcement of insurance requirement provisions between contracting parties. *See generally Hooks v. Southeast Construction Corp.*, 538 F.2d 431 (D.C. Cir. 1976). The Seventh Circuit enforced a like insurance provision in *Calcasieu Chemical Corp. v. Canal Barge Co.*, 404 F.2d 1227 (7th Cir. 1969). The Sixth Circuit recently followed suit in *Canarctic Shipping Co. v. Great Lakes Towing Co.*, 670 F.2d 61 (6th Cir. 1982).

The Ninth Circuit's decision herein finds support in *Price v. Zim Israel Navigation Co., Ltd., supra* note 25 (a similar insurance arrangement was enforced despite the argument it was prohibited by statute), and *Willamette-Western Corp. v. Columbia Pacific Towing Co.*, 466 F.2d 1390 (9th Cir. 1972) (waiver of subrogation enforced and held "not unusual" in maritime contract).

case;[57] in 1979, this Court decided that there was no split among the Circuits which required a decision of this Court to resolve. There has been no change since then; on the contrary, the Ninth Circuit's decision herein supports and reinforces the leading authority on the subject, the cases decided by the Fifth Circuit.

## VI
## CONCLUSION

For the reasons set forth above, Dillingham respectfully suggests that Union's Petition for Certiorari should be denied. This case is of little concern except to those parties named in the caption, and the Ninth Circuit's decision herein is in concert with all of the relevant decisions on point. The insurance requirement provisions of the towage agreement are not exculpatory clauses and are fully enforceable, having been agreed to in an arms'-length commercial transaction; this has been the uniform holding of the courts below. Finally, there is no conflict among decisions of the Courts of Appeals which requires this Court's resolution.

Respectfully submitted,

HANCOCK, ROTHERT & BUNSHOFT

By FORREST BOOTH

JOHN R. PASCOE

*Attorneys for*
*Dillingham Tug &*
*Barge Corporation*

**(Exhibit 1 follows)**

[57] 444 U.S. 830 (1979).

**Exhibit 1**

12/17/76

ATTN: HARRY KINSELLA

THIS IS TO CONFIRM OUR VERBAL AGREEMENT THIS DATE.

COLLIER CARBON CHEMICAL COMPANY CHARTERS HAWAIIAN TUG AND BARGE TO TOW THEIR 300 FT X 60 FT BARGE FROM GALVESTON, TEXAS TO PORTLAND OREGON. ETD GALVESTON ON OR ABOUT 15 JAN.

THIS WILL BE A SINGLE TOW AT THE LUMP SUM OF DLRS 125,000 FIO. COLLIER WILL PAY ALL PANAMA CANAL COSTS AND OUTFIT THEIR BARGE FOR SEA WITH BRIDLE AND EQUIPMENT REQUIRED BY SURVEYOR HT AND B WILL PAY COLUMBIA RIVER COST FOLLOWING REVIEW BY BOTH PARTIES. THIS TOW WILL FOLLOW THE TERMS AND CONDITIONS OF THE FOSS TOWING AGREEMENT OF 12/7/71.

THANK YOU FOR AWARDING HT AND B THIS TOW.

BST HOLIDAY WISHES,

REY JONSSON

UNIONOIL LSA B

**Exhibit 2**

1/4/77

CHARLIE DOW
COLLIER CHEMICAL

REQUEST YOUR CONSIDERATION TO MODIFY CONTRACT LANGUAGE AS FOLLOWS:

ARTICLE 6 — COLLIER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS HT AND B, ITS AFFILIATES, THEIR OFFICERS, EMPLOYEES, AND REPRESENTATIVES, AND THE TUG AGAINST ALL CLAIMS, LIABILITIES, LOSS OR EXPENSE, INCLUDING COSTS AND ATTORNEY'S FEES, ARISING OUT OF OR CONNECTED WITH INJURY TO OR DEATH OF PERSONS EMPLOYED OR BEING ON OR ABOUT THE BARGE AND/OR LOSS OF OR DAMAGE TO THE BARGE, UNLESS SUCH SHALL HAVE BEEN DUE TO THE SOLE FAULT OF HT AND B. ADDITIONALLY, COLLIER SHALL INDEMNIFY, DEFEND AND HOLD HARMLESS HT AND B, IT'S AFFILIATES, THEIR OFFICERS, EMPLOYEES AND REPRESENTATIVES AND THE TUG AGAINST ALL CLAIMS, LIABILITIES, FINES, PENALTIES, LIENS AND ALL OTHER LOSS OR EXPENSE OF ANY NATURE WHATSOEVER, INCLUDING COSTS AND ATTORNEY'S FEES, ARISING OUT OF OR CONNECTED WITH POLLUTION OR CONTAMINATION OF THE ENVIRONMENT BY THE BARGE OR ITS CONTENTS.

ARTICLE 7 — COLLIER SHALL MAINTAIN HULL AND MACHINERY AND PROTECTION AND INDEMNIFY INSURANCE ON THE BARGE TO ITS FULL VALUE IN FORM AND AMOUNT SATISFACTORY TO HT AND B, AND SUCH POLICIES SHALL BE ENDORSED WITH WAIVER OF SUBROGA-

TION AGAINST HT AND B AND THE TUG AND SHALL NAME HT AND B AS AN ADDITIONAL ASSURED WITH LOSS PAYABLE TO COLLIER. COLLIER SHALL LOOK SOLEY TO ITS HULL AND MACHINERY INSURANCE FOR THE RECOVERY OF ANY LOSS OR DAMAGE TO THE BARGE AND SOLEY TO ITS PROTECTION AND INDEMNIFY INSURANCE FOR WRECK REMOVAL EXPENSES.

ARTICLE 9—NOTWITHSTANDING ANY OTHER PROVISION HEREIN TO THE CONTRARY, COLLIER SHALL HAVE NO RESPONSIBILITY WITH RESPECT TO AND HT AND B WILL INDEMNIFY, DEFEND AND HOLD COLLIER HARMLESS FROM ANY AND ALL CLAIMS, LIABILITIES, LOSS OR EXPENSE, INCLUDING COSTS AND ATTORNEY'S FEES, ARISING OUT OF OR CONNECTED WITH INJURY TO OR DEATH OF THE OFFICERS AND CREW OF THE TUG, AND/OR LOSS OF OR DAMAGE TO THE TUG, UNLESS SUCH SHALL HAVE BEEN DUE TO THE SOLE FAULT OF COLLIER.

WE BELIEVE THE AMENDED LANGUAGE PROVIDES NECESSARY PROTECTION FOR BOTH PARTIES WHILE CLEARLY DEFINING LIABILITY OF EACH PARTY.

THE POLLUTION CLAUSE WAS NOT NECESSARY IN 1971 AS IT IS TODAY. PLEASE ADVISE YOUR CONCURRENCE TO AMENDMENTS. IF YOU HAVE ANY QUESTIONS, PLEASE PHONE ME AT (808) 543-9307.

REY JONSSON

**Exhibit 3**

UNIONOIL LSA B

1/6/77 NR

ATTN MR REY JONSSON
HAWAIIAN TUG AND BARGE CO

REGARDS YOUR TELEX OF 1-5-77, COLLIER ACCEPTS YOUR MODIFICATIONS TO ARTICLES 6, 7, AND 9. WE CORRECTED THE COMMENCEMENT DATE TO JANUARY 20, AND THE AGREEMENT DATE TO THE 17TH DAY OF JANUARY. THIS ASSUMES MR. OPATZ WILL SIGN THE AGREEMENT WITH OUR MR. OPENSHAW DURING YOUR VISIT ON JANUARY 17. PLEASE ACKNOWLEDGE.

C. A. DOW, MANAGER
PROJECT ENGINEERING

**Exhibit 4**

1/7/77

COLLIER CARBON CHEMICAL CORP
UNION OIL CENTER
P O BOX 60455
LOS ANGELES, CALIF

ATTN MR C A DOW

THANK YOU FOR YOUR CONCURRENCE WITH PROPOSED MODIFICATIONS. MR. OPATZ WILL SIGN AGREEMENT DURING 17 JAN VISIT.

BEST WISHES,

REY JONSSON
H T B

**Exhibit 5**

1/18/77 NR

ATTN MR REY JOHNSON
DILMAR CORPORATION
HONOLULU HAWAII

YOU AND WE AGREED BY TELEPHONE THIS DATE THAT THE DRAFT OF THE TOWAGE AGREEMENT, DATED JANUARY 2, 1977, AND THE MODIFICATIONS SUBSTITUTED THERETO FOR ARTICLES 6, 7, AND 9 TO ACCORD WITH YOUR TELEX OF JANUARY 5, 1977 AND COLLIER'S TELEX OF JANUARY 6, 1977 ARE BINDING AS A CONTRACT TO BOTH PARTIES UNTIL THE OFFICIAL CONTRACT IS CONFORMED. TWO COPIES OF THE OFFICIAL TOW AGREEMENT SIGNED BY OUR VICE PRESIDENT, MR. OPENSHAW, WERE MAILED TO YOUR OFFICE ON THIS DATE. PLEASE ACKNOWLEDGE. REGARDS,

C A DOW, MANAGER

**Exhibit 6**

1/19/77
1430 HOURS

ATTN: C A DOW

THIS IS TO ACKNOWLEDGE AND AGREE TO UR TLX OF 1/18/77. WE APPRECIATE THE OPPORTUNITY TO BE OF SERVICE TO COLLIER.

REY JONSSON
H T AND B

**Exhibit 7**

UNIONOIL LSA C

DILMAR CORPORATION 1/26/77

MR. REY JONSSON

PER OUR DISCUSSION YESTERDAY, COLLIER IS UNABLE TO NAME HT AND B AS ADDITIONAL ASSURED ON P AND I POLICY. ALSO HT AND B MUST OBTAIN ITS OWN TOWERS LIABILITY.

REGARDS,
C. A. DOW, MANAGER
PROJECT ENGINEERING

**Exhibit 8**

1/28/77

UNION OIL LSA
ATTN: C A DOW

RE INSURANCES ON BARGE COLUMBIA. AGREE TO DELETION OF REQUIREMENT THAT HTB BE ADDT'L ASSURED UNDER P AND I POLICY BUT PRESUME P AND I UNDERWRITERS DO AGREE TO WAIVER OF SUBROGATION. PLEASE CONFIRM. ALSO CONFIRM THAT HTB IS NAMED AS ADDT'L ASSURED WITH WAIVER OF SUBROGATION UNDER BARGE HULL AND MACHINERY POLICY. WE CONFIRM HTB HAS TOWER'S LIABILITY.

REY JONSSON
HTB

**Exhibit 9**

JAN 28/77 AM

TO: MR. REY JONSSON RUSH
DILMAR CORPORATION
HONOLULU HAWAII 96801

RE YOUR TELEX 1-28-77, CONFIRM THAT UNDERWRITERS AGREE TO WAIVER OF SUBROGATION UNDER BARGE P AND I POLICY. ALSO CONFIRM THAT HTB IS NAMED AS ADDITIONAL ASSURED WITH WAIVER OF SUBROGATION UNDER BARGE HULL AND MACHINERY POLICY. REGARDS,

C.A. DOW, MANAGER
PROJECT ENGINEERING

**Exhibit 10**

Collier Carbon and Chemical Corporation

Union Oil Center
P.O. Box 60455, Los Angeles, California 90060
213-486-6803

UNION COLLIER

December 27, 1976
PE—1159

Mr. Rey Jonsson
Marketing Manager
Hawaii Tug & Barge Co., Ltd.
P. O. Box 3288
Honolulu, Hawaii 96801

Dear Rey:

Re: P-8187 $NH_3$ River Barge Columbia Towing Agreement

Enclosed for your review is a draft of the Collier proposed towing agreement which is essentially the same as the Collier-Foss agreement of 1971.

Please review, and if you have comments, please phone C. A. Dow at (213)-486-6801 or telex same to expedite execution of the agreement.

Happy Holiday Season.

Sincerely,

/s/ Harry E. Kinsella CAD
Harry E. Kinsella
Project Manager

HEK:mm
Enclosure
cc: w/enclosure
G. Stearns/J. Niederhauser
Foss Tug & Launch

Office - Supreme Court, U.S.
FILED
FEB 6 1984
ALEXANDER L. STEVAS,
CLERK

NO. 83-945

IN THE

# Supreme Court of the United States

October Term, 1983

Union Oil Company of California,

Petitioner,

vs.

Dillingham Tug & Barge Corporation,
Nickum & Spaulding Associates, Inc.

and

The Salvage Association,

Respondents

BRIEF OF NICKUM & SPAULDING ASSOCIATES, INC., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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## QUESTION PRESENTED

Insofar as Nickum & Spaulding are concerned, the only question presented by the Petition for Certiorari of Union Oil Company is whether there is a sufficient issue for United States Supreme Court review where a court of appeals has found a trial court clearly erroneous under Civil Rule 52(a) in making a decision on a factual finding based on admittedly impeached and totally unreliable evidence.

## STATEMENT OF THE CASE

I. Facts.

Nickum & Spaulding are naval architects who were employed by Union Oil Company to prepare an open hopper barge designed exclusively for river use for a one time only ocean tow from Galveston, Texas to Portland, Oregon through the Panama Canal. The barge was 300 feet long and had an open hopper within which were placed two 280 feet

by 18 feet cylindrical tanks for containing and transporting anhydrous ammonia up the Columbia River. The purpose of the parties was to prepare the barge for the trip at a minimum reasonable expense. Union Oil had rejected a plan to place a cover over the hopper to keep out water as being too expensive. (F. 9; 548 F. Supp., at 693)

The transportation plan was a compromise of furnishing sufficient metal straps welded to the barge and passing over the tops of the tanks to assure that the empty tanks would not float away if the hopper should fill with water due to some accident or condition and cautioning the towing company, Dillingham, to, inter alia, handle the tow with great care, keep the hopper dry, not exceed 8 knots and:

> Towing speed to be regulated consistent with good seamanship and to conform with weather conditions in order to eliminate possible pounding damage. (Exhibit 85).

Gordon Snyder, the principal naval architect in charge for Nickum & Spaulding, prepared calculations, in part as required by the Coast Guard, showing that if the vessel filled with water, the straps were sufficient to retain the tanks in position. The calculations were based on a static condition but had a 2:1 margin of stress capacity over the calculated stress to be encountered. This safety margin was deemed adequate by Mr. Snyder and by Mr. David B. Waller, the naval architect retained by Salvage Association to review Mr. Snyder's calculations. (TR 1300)

There was no computer or other program reasonably available from which precise stress measurements could be made in the maximum dynamic stress condition of the vessel resting across the pinnacle of a design (maximum) wave, at least without excessive cost, because of the unique

structure of the barge COLUMBIA as modified. (TR 979)

An after-the-fact attempt to apply the MMT-10 Coast Guard computer program produced the undisputably unreliable results noted by the Court of Appeals (707 F.2d at 1092) in its opinion in which it found the District Court clearly erroneous in basing a factual finding on such unreliable and impeached evidence.

The tow successfully completed approximately 70% of its trip until the early morning (0200) of February 25, 1977 when it encountered heavy seas (10-12 foot waves) head on while towing at maximum speed. Although the bow of the barge was observed as being down at 0700, demonstrating the existence of substantial water in the hopper, the tow continued on course directly into and across "rough northwesterly swells" with minimal speed reductions. At 1235, the bow was so far down

that the tow captain elected to slightly change course from 315° to 345° to Bahia Ballenas, 120 miles away, still directly into the heavy seas. (F. 26-35; 548 F. Supp. at 696)

During this entire morning, a protected cove, Bahia Santa Maria, was 20 miles away on a course of approximately 110°. This course would have put the barge in the trough of the waves, eliminating the maximum longitudinal stresses encountered when crossing the waves, and furnished an anchorage which was well protected, had good depth and was one of the best possible refuges on the coast. (TR 1082)

The barge lost its first tank at 1305, after which it did change course to Bahia Santa Maria, its second tank at 1517. The barge itself was not lost until 1900, only 4 miles from the refuge.

II. Proceedings in Courts Below.

The District Court (548 F. Supp. 691) found in Finding of Fact No. 11 that Nickum & Spaulding never advised Collier (Union) that there was an increased risk by removing the cover nor did they advise Collier that the calculations were incomplete in any way or that proper calculations were not performed. (694)

At page 698, the District Court concluded that post-accident computer calculations were performed and

> these calculations showed the straps were not sufficient. It is true that these calculations were performed over the objections of Mr. Snyder and he did not agree with the results (omitted material). The errors in calculations and particularly the failure to advise Collier, constituted negligence on the part of Nickum & Spaulding which directly contributed to the loss of the barge COLUMBIA by 20%.

The Court of Appeals reversed this conclusion with the following determination, 707 F.2d 1086 at p. 1092.

> In making this finding, the trial judge relied on post-accident computer printout results from a Coast Guard MMT-10 computer printout.
> This program was used to analyze stresses in conventional barges, but there was uncontradicted testimony from three experts that the program did not produce reliable results when applied to the COLUMBIA.[6] It was clearly erroneous for the trial judge to base his finding on this concededly unreliable program.

It is this ruling for which the petitioner seeks review.

## ARGUMENT

I. There Are No Special or Important Reasons for Granting Certiorari in This Case, at Least as it Relates to the Issues Involving Nickum & Spaulding Associates.

As indicated above, the District Court assessed 20% liability against Nickum & Spaulding for the barge loss damages it awarded to Union because the court concluded that Nickum & Spaulding was negligent in not utilizing a Coast Guard MMT computer program for the purpose of measuring the maximum stress which could be borne by

the metal tie down straps on the barge COLUMBIA in a hopper flooded condition or in not advising Union that Nickum & Spaulding had not performed these calculations. (Petition, Appendix, p. 28, Conclusion 5)

In reversing, the Court of Appeals noted that the results of this computer program were not only deemed erroneous by Mr. Snyder and Mr. Stern but also by Union Oil Company's own witness, Mr. Maris, because of the "very suspicious" numbers produced by the program and who stated it would cause him to "question both the program and the input data into the program." 707 F.2d 1086 at 1092, fn. 6.

The petitioner requests this court to undertake on certiorari a review of a review by the Court of Appeals of a District Court's decision on an entirely evidentiary matter. The only conceivable category and the one urged by the petitioner under Rule 17(a) entitled "Considerations

Governing Review on Certiorari" is that the Court of Appeals . . . has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

It certainly needs no case citation to sustain the proposition that a trial judge's decision based on totally impeached evidence should be reversed. Far from being a departure, the Court of Appeals decision in this case was a simple application of Civil Rule 52(a) as interpreted by this court in United States v. United States Gypsum Company, 333 U.S. 364, 92 L.Ed. 746, at page 396 of U.S.

> A finding is "clearly erroneous" when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed.

The issue in the present case involves only Union Oil Company, Nickum & Spaulding

and The Salvage Association, whose relevant contentions on this issue in its brief in opposition to the petition are fully supported by Nickum & Spaulding. The factual pattern of the case is unique, nonrecurring, involves only money damages and has no public importance or interest whatsoever. The legal issue in applying Rule 52(a) is well settled and routine. There is no reason for granting certiorari.

II. Court of Appeals Finding of No Causation is Fully Justified and is Not a Departure from the Accepted and Usual Course of Judicial Proceedings.

Gordon Snyder, the principal naval architect involved with Nickum & Spaulding in designing the modifications for the COLUMBIA, did perform calculations as to the anticipated stresses and stated that the manner of making these calculations represented the only feasible procedure by which the problem could be analyzed with existing programs and within the time involved (TR 979). He had originally

recognized the nonsuitability of the MMT-10 program as applied to the structural configuration of the COLUMBIA. (F. 5, 548 F. Supp. at 698)

Snyder's calculations were reviewed and approved as adequate prior to modification of the barge by the naval architect employed by The Salvage Association, David B. Waller (TR 1300).

Because the calculations performed by Snyder did not precisely predict the maximum stress which might be encountered on the straps with the hopper flooded and while the vessel was balanced on the pinnacle of a design wave, the appellate court sustained the trial court in the abstract finding that it was negligent not to advise the client that such calculation had not or could not be made.

However, both Snyder and Waller concluded that there was more than sufficient stress margin to complete the tow as contem-

plated if the tow were properly handled. (TR 1300) As found by the Court of Appeals, this conclusion was sustained by the other naval architect experts testifying at the trial including Union's expert. The appellate court properly reasoned that if the tow could be accomplished if handled in accordance with the tow instructions and good seamanship practices, then the sole proximate cause of the loss was the negligence of Dillingham in failing to handle the tow in that manner. (707 F.2d at 1093)

In an effort to avoid this logic, Union in its petition cites several pages of testimony establishing that Snyder and other parties were aware that the hopper of the COLUMBIA might be flooded and that the hold down straps had to be designed to withstand the lift off stress imposed by the empty 280 foot tanks if this event should happen. (Petition, pp. 15-20) Union then states in its petition, at p. 19, that

> Contrary to the predictions of N & S, on the first occasion the COLUMBIA flooded, the straps broke, the cargo tanks floated free and the barge sank.
>
> Admittedly the cause for water entering the hopper was Dillingham's negligence. However, N & S had supposedly anticipated this contingency by designing a barge that would stay afloat with its hopper flooded.

What Union has totally disregarded is the impact of Dillingham's continued exposure of the barge to the maximum possible stresses over a period of many hours after the hopper commenced filling from waves being encountered head on with the water intake progressing as the bow rode lower into the waves. As the Court of Appeals noted from the record, Union did not want and did not want to pay for a "ocean going barge." (707 F.2d at 1093) It wanted the least expensive modifications reasonably necessary to accomplish a one time tow to the Columbia River. For any barge to have stood the pounding imposed on it by the

Dillingham tow on February 25, it would have had to have been a fully structured ocean going barge.

What was clearly contemplated and the towing crew was so instructed in detail, is that if conditions were encountered wherein water was taken into the hopper, including to the point of being full, the tow would make every effort to minimize stress on the vessel by course and speed selection until the barge could be pumped dry. As naval architect Waller testified, a full hopper was an emergency, extremus condition (TR 1226-1228). From this it can be concluded it was not a condition to be substantially disregarded while the captain of the tow bypassed a refuge 20 miles away to head for one 120 miles away while traveling at 6 knots.

In fact, the barge performed quite well under the circumstances. Although it had been taking on water from 0200 to the

point where the bow was down at 0700 and heavily down by 1235, the straps on one tank lasted until 1305 and the other until 1517. The barge itself was not lost until 1900, just 4 miles from safe haven. (548 F. Supp. at 696).

A turn to Bahia Santa Maria at any time from the first observance of trouble at 0700 until the loss of the tank at 1305 would have undoubtedly saved the tow by heading for a shelter which was only three or for hours away while the barge proceeded in the direction of the trough of the waves, going from maximum to minimum stress.

Even if the Supreme Court were to disagree with the appellate court on its evaluation of the evidence and its application of the logic of proximate cause, such a disagreement would still not be a "departure from the accepted and usual course of judicial proceedings" nor would it call for the exercise of the power of supervision. In

the present case, the appellate decision is so clearly correct as to render Union's petition in this regard virtually frivolous. The petition for certiorari on this issue should be denied.

Respectfully submitted,

OLES, MORRISON, RINKER,
STANISLAW & ASHBAUGH

Seth W. Morrison
3208 Seattle-First National
Bank Building
Seattle, Washington 98154
(206) 623-3427
Attorneys for Nickum &
Spaulding Associates,
Inc.

Rule 28.1 certification

Marine Management International Corporation is an affiliated corporation to Nickum & Spaulding Associates, Inc.

SWM-1/1

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Office Supreme Court, U.S.
FILED
JAN 7 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-945

IN THE

# Supreme Court of the United States

OCTOBER TERM 1983

UNION OIL COMPANY OF CALIFORNIA,
*Petitioner,*

vs.

DILLINGHAM TUG & BARGE CORPORATION, NICKUM & SPAULDING ASSOCIATES, INC., and THE SALVAGE ASSOCIATION,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

McCUTCHEN, DOYLE, BROWN & ENERSEN

RICHARD C. BRAUTIGAM
*Counsel of Record*
NORMAN B. RICHARDS
MARILEE J. ALLAN
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000
*Attorneys for Respondent*
The Salvage Association

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No. 83-945

IN THE

# Supreme Court of the United States

OCTOBER TERM 1983

UNION OIL COMPANY OF CALIFORNIA,

*Petitioner,*

VS.

DILLINGHAM TUG & BARGE CORPORATION, NICKUM & SPAULDING ASSOCIATES, INC., and THE SALVAGE ASSOCIATION,

*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## QUESTION PRESENTED

Should certiorari be granted as to respondent The Salvage Association ("Association"), the following question would be presented:

1. The Salvage Association conducted an insurance survey of a river barge for a one-time ocean tow. The barge had been modified prior to the tow, and the Association asked a naval architect to review certain calculations which had been prepared by the architects who had designed the modifications. The trial court found the Association vicariously negligent for the barge's loss at

sea solely because the naval architect failed to discover certain omissions in those calculations, and then held that that imputed negligence was a proximate cause of the barge's loss. Was there substantial evidence to support that causation finding where:

a) the evidence purportedly showing that performance of the omitted calculations by the designing architects would have made a difference was "concededly unreliable," and

b) the uncontradicted evidence established that if the tug had towed the barge as contemplated, the barge would not have been lost?

## STATEMENT OF THE CASE

### A. The Facts

In May 1976, Collier Carbon and Chemical Corporation ("Union"), then a subsidiary of Union Oil Company, purchased the COLUMBIA, a 300-foot river barge. Union decided to have it towed from Galveston, Texas to Portland, Oregon. For this one-time ocean tow, Union hired naval architects Nickum & Spaulding Associates, Inc. ("Nickum & Spaulding") to draw plans and specifications to modify the barge. At Union's request, Nickum & Spaulding's design kept the COLUMBIA as an open hopper barge but added 36 metal tie-down straps four feet in width to hold two large cargo tanks in the barge. (Ex. 112, p. 6; RT 1246)

Union hired the Salvage Association to perform an "insurance survey" so that Union could obtain insurance for the tow. The Association was paid $1,250 for the insurance survey. (RT 1800) The Salvage Association issued its certificate, stating that the barge was "fit to proceed on the voyage contemplated," and Union got the insurance it wanted. (Ex. 85, p. 6) The Association left no doubt as to what voyage was "contemplated"; its certificate contained certain "special considerations" as to how the tug was to perform the tow, including:

— The towing speed was not to exceed 8 knots, and if weather conditions required it, the towing speed was to be reduced to eliminate any possible damage to the barge; and

— The tug's crew was to check the barge periodically to insure that it had not taken on water, and if it had, the water was to be pumped out immediately. (Pet., Ex. 4, p. 21, Fdg. 20)

Union hired Dillingham Tug & Barge Corporation ("Dillingham") to tow the barge. The towage contract explicitly required Dillingham to give "due regard" to the Salvage Association's "special considerations." The tug's captain knew that the Association's "special considerations" were to be followed, and he signed and took a copy of them with him. (Ex. 85, p. 3; RT 494-95) He particularly knew that the barge was to be pumped out at "every opportunity," admitting that that was "part of the deal". (RT 480) The captain assured the Association that the hopper would in fact be pumped out and that he "would do it at port, if necessary, and if the bow was taking on water, I would make sure I got somewhere I could do it. I guaranteed them that." (RT 382) He promised that if he could not reach port or get a man aboard the barge at sea, he would just "have to pull into some cove" and pump the barge out. (RT 395-96)

Union gave a copy of Nickum & Spaulding's calculations to the Association. Although nothing in the survey contract required the Association to do anything with them (Ex. 85, p. 1), the Association gave them to an independent naval architect, Mr. Waller, and asked him to look them over, paying him $200 to do so. (RT 1251)[1] The trial court concluded that Nickum & Spaulding's calculations were negligently performed because they did not include calculations as to the stress the tie-down straps would encounter in dynamic water conditions with the barge's hopper flooded. (Pet., Ex. 1, p. 10) Mr. Waller did not conclude that the absence of those calculations was an error, and it is solely because he did not reach that conclusion that the trial court held Mr. Waller negligent and then, by imputation, held the Association negligent. (Pet., Ex. 4, pp. 28-29, Concl. 6)[2]

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[1] Accordingly, Union's statement that the Salvage Association, itself, reviewed the Nickum & Spaulding calculations (Pet., p. 3: 9-10) is untrue.

[2] Accordingly, Union's statement that the trial court found the Association negligent in the performance of its survey "and the review of engineering calculations" (Pet., p. 5) is untrue; the sole basis for the finding of negligence was Mr. Waller's review of the Nickum & Spaulding calculations.

The trial court's finding that the absence of dynamic, hopper flooded calculations contributed to the loss of the barge rested on a computer printout which purportedly showed the results of such calculations. (Pet., Ex. 1, p. 11) But the "uncontradicted testimony" established that the program did not produce reliable results when applied to this barge. (*Id.*)

In addition, the Dillingham tow was not what was "contemplated." When the barge left Panama, it had over one foot of water in its forward compartment, but the tug captain failed to pump it out as promised. (Pet., Ex. 4, p. 22, Fdgs. 23 & 24). On February 20, the barge laid over in Acapulco for 22 hours, yet it was still not pumped out, although it could have been. (Pet., Ex. 4, p. 23, Fdg. 26)

Moreover, despite bad weather and ten foot seas, the barge was towed in excess of the Association's eight-knot limitation on every day after Panama except the day on which the barge was lost. (Pet., Ex. 4, pp. 22-23, Fdg. 25) The excess speed increased the pounding which the barge experienced, augmenting both the loads on the metal straps and the large amount of water entering the hopper.

By February 25, the barge was " 'pitching hard in rough (northwesterly) swells' as [it] encountered 'heavy sea (from) head on.' " (Pet., Ex. 4, p. 23, Fdg. 27). By 0730 on that day the barge had taken on so much water that its painted white draft marks could not be seen (*Id.*, Fdg. 28; RT 596)[3], and it was pounding and taking spray and possible green waves into the hopper. (*Id.*, Fdg. 28; RT 584). As of that time, "it was apparent . . . that the barge was in peril". (Pet., Ex. 4, p. 26, Concl. 3)

Nevertheless, the tug's captain did not pump out the barge, wait out the bad weather, turn the barge into the trough of the swells to reduce pounding and taking on of water, or seek refuge in the port of Bahia Santa Maria, then only twenty miles to the east. (Pet., Ex. 4, pp. 23-24, Fdgs. 27-30; RT 621-22,

[3] The Association had recommended the painting of the white draft marks. (Ex. 85, p. 6) The tug's crew understood that those marks were there so they could determine if the barge had taken on water (Pet., Ex. 4, p. 22, Fdg. 22), and they knew it was "important" to check them day and night. (RT 182)

141-42, 231, 593-94) Instead, the tug continued to tow the barge into the ten-foot waves for hours. (Pet., Ex. 4, pp. 23-24, Fdgs. 28-30; RT 599, 749-50) When the tug finally decided to seek refuge, it headed for Bahia Ballenas, which was more than 100 miles away and in a direction which required the barge to be towed into the swells. (Pet., Ex. 4, p. 24, Fdg. 31) By then it was too late; the cargo tanks broke loose, and the barge sank. (*Id.*, Fdgs. 32-35)

**B. The Court of Appeals' Decision**

The Court of Appeals for the Ninth Circuit affirmed the finding of negligence as to Nickum & Spaulding. Contrary to Union's statement (Pet., p. 15:4-6), the court did not address whether there was any evidence to support the finding that the Salvage Association was negligent. (Pet., Ex. 1, p. 12) Instead, the court reversed the judgments against both Nickum & Spaulding and the Association on the ground that the trial court's causation finding was "clearly erroneous." (Pet., Ex. 1, p. 11) The court based that conclusion on two grounds:

First, it held that "causation, in this case, would necessitate a finding that, had the omitted calculations been performed, they would have demonstrated the straps were not in fact sufficient for the contemplated voyage." While the trial judge did make such a finding, it rested on a "concededly unreliable" computer program, making the finding clearly erroneous. (Pet., Ex. 1, p. 11)

Second, the uncontradicted evidence established that "had Dillingham conducted the tow as they were advised to, the barge would have survived the tow and therefore the barge was properly designed for the contemplated tow." Accordingly, the Nickum & Spaulding calculations were not the cause; "the barge was lost due to Dillingham's failure to conduct the tow properly." (*Id.*, pp. 11-12)

## REASONS FOR DENYING THE WRIT

Nowhere does Union's Petition show any "special and important reasons" to grant the writ as to Nickum & Spaulding or the Salvage Association.[4] (Rule 17.1) The Petition does not even assert that the court of appeals' decision respecting causation creates a conflict among the circuits, or with the decisions of this, or any other, court. Nor does the Petition suggest that that decision raises any question of law, unsettled, important or otherwise.

Instead, the Petition argues only that this Court should grant a hearing to consider whether the court of appeals was correct in reversing the trial court's factual causation holding in this particular case. (Pet., pp. 14-21) The Petition does not and cannot contend that the review of that factual question would have any significance beyond this case.

But "[t]his Court does not sit for the benefit of particular litigants . . . ." *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 73-74 (1932) (Frankfurter, J.) Nor is this Court "the place to review a conflict of evidence [or] to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other. . . ." *National Labor Relations Board v. Pittsburg Steamship Co.*, 340 U.S. 498, 503 (1951). *See e.g., United States v. ITT Continental Baking Co.*, 420 U.S. 223, 226-27 n.2 (1974); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178-79 (1938); *Federal Trade Commission v. American Tobacco Co.*, 274 U.S. 543, 544 (1927) (The Court is to "adhere to the usual rule of noninterference where conclusions of Circuit Courts of Appeal depend on appreciation of circumstances which admit of different interpretations.")[5] Accordingly, the Petition shows on its face that it should be denied.

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[4] Petitioner's arguments as to the Ninth Circuit decision's purported conflict with *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 (1955) and with decisions of other Circuit Courts of Appeals pertain only to the Union-Dillingham towage agreement. (Pet., pp. 7-14) A decision by this Court on the enforceability of that agreement would not affect the Ninth Circuit's

*(Footnotes continued on following page)*

Moreover: (a) The court of appeals was clearly correct on the factual causation issue the Petition discusses; (b) the court of appeals had an independent basis for its causation ruling which the Petition does not discuss; and (c) the court of appeals' result as to the Salvage Association is right, regardless of the causation issue. We turn to those points next; each independently establishes that the Court should deny review of the Petition's second question.

## A. The Court of Appeals Correctly Held That The Improper Tow Was the Cause.

Union argues that the tow provided by Dillingham was what the parties contemplated, and it then spends four pages quoting testimony to the effect that the parties expected water to get into the barge. (Pet., pp. 16-19)[6] But what Union does not tell the Court is that the Association's special considerations called for the tug to pump the water out, and that the tug's captain "guaranteed" he would do so. Thus, while the parties

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*(Footnotes continued from preceding page)*

disposition of Union's claims against Nickum & Spaulding or the Salvage Association. The Court, of course, is free to grant certiorari on limited issues. *E.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 424 U.S. 908 (1976); *Davis v. Mississippi*, 393 U.S. 821 (1968).

[5] This case is not within the range of exceptions carved out by this Court. It is neither a First Amendment factual matter (e.g., *Jacobellis v. Ohio*, 378 U.S. 184, 189 (1964)), nor a due process criminal procedure case (*e.g., Chambers v. Florida*, 309 U.S. 227, 228-29 (1940)). For some years, the Court occasionally granted certiorari on factual matters to review the application of the Federal Employers' Liability Act or in longshoremen's injury actions. *See e.g., Bailey v. Central Vermont Ry., Inc.*, 319 U.S. 350, 356-58 (1943) (Roberts, J. dissenting); *Sentilles v. Inter-Caribbean Shipping Corp.*, 361 U.S. 107, 111 (1959) (Frankfurter, J. dissenting). 13 Moore's Federal Practice ¶ 817.41 at SC17-44 (1982). Petitioner's case, *Guzman v. Pichirilo*, 369 U.S. 698 (1962) falls in this category and time period. This case does not.

Besides, in *Guzman v. Pichirilo* certiorari was granted because there was a conflict between the Circuits on a point of law. 369 U.S. at 699, 703-04. The Court did not grant certiorari to review a factual record (even though the Court, in the end, avoided decision on the legal issue).

[6] Even Union admits that "the cause for water entering the hopper was Dillingham's negligence." (Pet., p. 20)

may have contemplated that water might splash into the open barge, "part of the deal" was that it would not stay there, but would be pumped out.

Contrary to its contract, its duty of due care and the captain's guarantee, the tug never pumped the barge out. It also towed the barge at excessive speeds and allowed it to become flooded with water. Moreover, even after it was "apparent . . . that the barge was in peril" (Pet., Ex. 4, p. 26, Concl. 3), the tug continued to tow it, flooded, into rough head seas for five and a half hours. (Pet., Ex. 4, pp. 23-24, 26, Fdgs. 28-32, Concl. 3) Union points to no evidence — and there is none — which would support a finding that the parties contemplated such an irresponsible tow.

Finally, Union does not deny that had the tug acted properly, the barge would have survived the tow (Pet., Ex. 1, p. 11); indeed, such evidence came from its own expert. (*Id.*, p. 11, n.7) In these circumstances, it is hardly fair — or accurate — to say that the court of appeals "departed" from its accepted role in reversing the finding of causation. To the contrary, it was entirely correct.[7]

**B. The Court of Appeals' Alternate Basis For Its Causation Holding Is Undisputed.**

Contrary to Union's implication, the court of appeals' causation holding does not rest solely on the undisputed evidence establishing that if the barge had been towed as contemplated, it would not have been lost. The court of appeals also held that there was no reliable evidence to support a finding that if the omitted calculations had been performed, they would have demonstrated that the tie-down straps were insufficient. (Pet., Ex. 1, p. 11)

[7] Union does not dispute the law that where a tug imprudently fails to save a tow when obviously in peril, the tug is the sole proximate cause of the loss, even if the condition creating the peril was caused by another. See *American Bridge Division, U.S. Steel Corp. v. Roen Steamship Co.*, 216 F.Supp. 353 (E.D. Wis. 1963) *aff'd*, 328 F.2d 838 (7th Cir. 1964); *Chemical Transporter, Inc. v. M. Turecamo, Inc.*, 290 F. 2d 496, 497 (2d Cir. 1961); *Mississippi Valley Barge Line Co. v. T. L. Janes & Co.*, 144 F.Supp. 662, 667-68 (E.D. La. 1956) *aff'd*, 244 F.2d 163 (5th Cir.), *cert. denied*, 355 U.S. 871 (1957); *Pillsbury v. Delta B & B*, 1979 AMC 1221, 1229-30 (E.D. La. 1978) *rev'd in other part*, 1980 AMC 2323 (E.D. La. 1979).

Union does not even mention that basis of the court's decision. Thus it does not dispute that such a finding was necessary before causation could be found; and it does not dispute that the "evidence" the trial court relied on to make that finding was not "reliable." (Pet., Ex. 1, p. 11) The court of appeals' uncontested decision to set aside a finding which rests only on "concededly unreliable" evidence raises no issue at all, let alone an issue worthy of this Court's review.

**C. The Result Is Correct in Any Event**

Although the court of appeals' decision reversing the judgment against the Association turns on the absence of any reliable evidence of cause, that is not the only basis on which the Association is entitled to judgment. Among other reasons, the Association is also entitled to judgment because:

(1) The finding that the Association was negligent cannot stand as a matter of law because there was no evidence respecting the standard of care applicable to an architect's review of another's design calculations or whether Mr. Waller breached that standard, whatever it was.

(2) There is no basis for attributing Mr. Waller's negligence, if any, to the Association because he was an independent contractor to the Association; and

(3) The undisputed evidence established that if the tug had performed the tow in accordance with the Salvage Association's "special considerations", the tow would have been successful; accordingly, the trial court held the Association liable for giving a correct opinion.

The favorable resolution of any one of these issues would entitle the Association to judgment as a matter of law.[8] The court of appeals addressed none of them because it was unnecessary for it to do so. There certainly is no need for this Court to review the court of appeals' causation holding where that review could, at most, result in a remand for consideration of these and other issues.

[8] The Salvage Association raised all of them, and others, to the court of appeals.

## CONCLUSION

The Petition should be denied.

Dated: January 5, 1984.

Respectfully submitted,

McCUTCHEN, DOYLE,
BROWN & ENERSEN

RICHARD C. BRAUTIGAM
*Counsel of Record*

NORMAN B. RICHARDS
MARILEE J. ALLAN
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

*Attorneys for Respondent*
The Salvage Association

## LIST OF RELATED COMPANIES REQUIRED BY UNITED STATES SUPREME COURT RULE 28

The undersigned, counsel of record for Respondent The Salvage Association, certifies that Rush Johnson Associates, Inc. is an affiliate of the Salvage Association.

RICHARD C. BRAUTIGAM
*Counsel of Record*
*for Respondent*
The Salvage Association